TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 149.

JAY DELAMATER, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH DAKOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

FILED NOVEMBER 13, 1905.

(19,963.)

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INDEX.

	Original.	Print.
Caption	1	1
Petition for writ of error to circuit court of Potter county	2	1
Allowance of writ of error to circuit court of Potter county	9	5
Writ of error to circuit court of Potter county	11	5
Citation on writ of error to circuit court of Potter county	14	6
Transcript from circuit court of Potter county	17	7
Writ of error	17	7
Clerk's certificate	19	8
Certificate of trial judge	20	9
Certificate of probable cause for writ of error	21	9
Bill of exceptions	23	10
Information	25	11
Demurrer	27	12
Statement of evidence	28	13
Motion for verdict for defendant	29	14
Verdict	30	14
Motion in arrest of judgment	30	15
Motion for new trial	32	15
Judgment and sentence	33	16
Assignment of errors	34	17

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	Original.	Print.
Stipulation as to bill of exceptions	36	18
Judge's certificate to bill of exceptions	37	19
Judgment and sentence	39	19
Motion for new trial	41	20
Motion in arrest of judgment	43	21
Demurrer to information	45	22
Minutes of trial	46	22
Stenographer's report of trial	49	24
Testimony of Jay Delamater	49	25
Motion for verdict for defendant	51	26
Stenographer's certificate	52	26
Information	53	27
Brief for plaintiff in error (omitted in printing)	58	—
Abstract of plaintiff in error (" ")	75	—
Citation	88	29
Brief of S. M. Howard for defendant in error (omitted in printing)	92	—
Brief of Hall & Lawrence for defendant in error (omitted in printing)	152	—
Argument and submission	222	30
Judgment	224	30
Opinion by Haney, J	226	31
Corson, J	237	36
Fuller, J	245	40
Clerk's certificate to opinions	247	41
Order allowing writ of error	249	42
Petition for writ of error	250	42
Assignment of errors	252	43
Writ of error	259	46
Citation	263	47
Bond on writ of error	267	48
Clerk's certificate to record	270	49
Stipulation to omit parts of record in printing	271	49

1 In the Supreme Court, State of South Dakota.

No. 2083.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DELAMATER, Plaintiff in Error.

Be it remembered, that on the 8th day of April, A. D. 1904, that being a day of the regular April, 1904 term of said Court, there was filed in the above entitled cause, a petition for a writ of error, which said petition is in words and figures as follows, to-wit:

2 In the Supreme Court, State of South Dakota.

STATE OF SOUTH DAKOTA, Plaintiff and Defendant in Error,
vs.
JAY DALAMATER, Defendant and Plaintiff in Error.

Petition for Writ of Error to the Circuit Court of Potter County.

To the Supreme Court of the State of South Dakota:

J. Dalameter the defendant in the above entitled action having been convicted and sentenced in the Circuit Court of Potter County, South Dakota of the crime of soliciting orders for the sale of intoxicating liquors in lots of less than five (5) gallons without having paid a license therefor as required by Section 2834 Revised Political Code of South Dakota 1903 which provides as follows:

"In all townships precincts, town and cities of this State there shall be annually paid the following license upon the business of selling or keeping for sale by all persons whose business in whole or in part consists in selling or keeping for sale in this state, distilled, brewed or malt liquors or mixed liquors as follows: * * * upon the business of selling or offering for sale any of the above mentioned liquors at retail by any traveling salesman who solicits orders by the jug or bottle in lots of less than five gallons, two hundred dollars per annum. Said license to be paid in each county in which said traveling salesman does business in accordance with the provision of section 2836 * * * .

Respectfully applies to this court for a writ of error to the Circuit Court of Potter County South Dakota from the judgment of conviction and sentence rendered by said Circuit Court against him
3 and as and for the grounds of this petition respectfully shows to the court.

That at the regular March A. D. 1904 term of the Circuit Court in and for the County of Potter in the State of South Dakota an information was filed against this defendant charging * * * "That the said J. Dalameter on the 10th day of February A. D. 1904 at and within the County of Potter and State of South Dakota was then

and there a person whose business consisted in whole or in part in unlawfully selling or offering for sale spirituous, vinous, malt, brewed, fermented or other intoxicating liquors as a traveling salesman who then and there unlawfully solicited orders for such intoxicating liquors by the jug, bottle or vessel in lots of less than five gallons each, at one time and without having paid the license to said County of Potter or to the treasurer thereof as required by Section 2834 of the revised political code of the year 1903 of the state of South Dakota * * * . To which information this defendant demurred on the ground "That the facts stated in said information do not constitute a public offense," which demurrer was, by the Court, overruled and an exception was entered and settled for the defendant.

That this defendant thereupon entered his plea of not guilty to the crime charged in the information.

That said action was brought on for trial to the court an- a jury, that the following testimony was introduced:

"That the defendant, J. Dalameter is now and was on the 10th of February A. D. 1904, a traveling salesman employed by Lewis L. Metzger & Co. and that the said Lewis L. Metzger & Co. are residents of the City of St. Paul in the State of Minnesota and that the said Lewis L. Metzger & Co. have their place of business at the said City of St. Paul and have no place of business in the State of South Dakota and have had no such place of business in said State

4 of South Dakota.

That on the 10th of February A. D. 1904 J. Dalameter as such employee was engaged as said traveling salesman in soliciting proposals or orders for the said Lewis L. Metzger & Co. for the sale of intoxicating liquors in quantities less than five gallons from citizens and residents of and within the County of Potter and State of South Dakota who were not merchants, traders or dealers in intoxicating liquors, that on said date he solicited and requested proposals or orders from Ferdinand Renner and Paul Cross who were not merchants, traders or dealers in intoxicating liquors at and in the County of Potter and State of South Dakota soliciting or requesting proposals or orders from said last named persons for the sale to them by Lewis L. Metzger & Co. of said intoxicating liquors.

That the said proposals and orders were procured by the defendant from said named persons forwarded to his principal the said Lewis L. Metzger & Co. in the City of St. Paul and State of Minnesota. At said time no money was paid by either of the said persons to the said defendant or to said Lewis L. Metzger & Co. and said proposals or orders were forwarded with the understanding that they were subject to the approval of said Lewis L. Metzger & Co. and that the defendant had no power or authority to approve said proposals or orders nor to receive any money thereon. In addition to being subject to the approval of said Lewis L. Metzger & Co. said proposals or orders were conditioned that the said whiskey so ordered should be delivered to the said Ferdinand Renner and Paul Gross hereinbefore named, f. o. b. cars at the city of St. Paul and State of Minnesota. That the said Ferdinand Renner and Paul Gross hereinbefore named were to

pay the *greight* from the City of St. Paul and State of Minnesota and were to make remittance of the purchase price of said goods to said Lewis L. Metzger & Co. at the City of St. Paul in the State of Minnesota within sixty (60) days after the receipt of said liquor in said County of Potter. That this defendant has never paid any license to the County of Potter or State of South Dakota or to the
5 treasurer or to anyone as required by Section 2834 of the Revised political code of the year 1903 of the state of South Dakota and that the said defendant had not then and there and has never paid any license or fee whatsoever to any township, precinct, town or city within the said County or State and that the said liquor therein sold was intoxicating liquor to wit: whiskey and was not a proprietary patent medicine and that the said defendant is not now and never has been a licensed pharmacist under the laws of the State of South Dakota."

The taking of testimony having concluded and both sides having rested the said case the following motion requesting the court to advise the jury to return a verdict for the defendant was interposed by the defendant:

"At this time the defendant asks the Court to advise the jury to return a verdict for the defendant upon all of the issues for the reason that it affirmatively appears from the evidence and the undisputed evidence of the State that no offense has been committed, that it affirmatively appears that no sale was made within the State of South Dakota and for the further reason that the statute under which the prosecution is brought is unconstitutional and void in that it is in conflict with Section 8 of Article one (1) of the Constitution of the United States which places in Congress the sole and exclusive right and authority to regulate and control inter-state commerce. It affirmatively appears in this case from the uncontradicted testimony that this was and is a transaction involving and being inter-state commerce business being a sale made in the State of Minnesota on proposals or orders received in the State of South Dakota subject to the approval of the principal in the State of Minnesota that the goods were to be delivered to the parties who were named as purchasers in the State of Minnesota, the freight to be paid from the City of St.
Paul in the State of Minnesota by said purchasers, that the
6 said act under which said prosecution is drawn is unconstitutional and void being in direct conflict with the powers of the Congress of the United States and of article 1, of section 8 of the Federal Constitution."

Said motion was, by the Court, denied and an exception to such ruling allowed and settled for the defendant.

The jury after retiring to consider of their verdict returned a verdict finding the defendant "guilty as charged in the information." to which verdict the defendant was allowed an exception which was duly entered and settled for.

The defendant being called for sentence interposed a motion in arrest of judgment setting forth:

"1. That the facts stated in the information filed against this defendant in this action do not constitute a public offense.

2. That the act or law under which the information in this action is drawn is unconstitutional and void, said act being in conflict with Article 1, Section 8 of the Constitution of the United States, the said law being an attempt by the legislature of the State of South Dakota to hamper, interfere with and restrict inter-state commerce."

Which said motion was by the Court, on each and every ground duly overruled and an exception allowed and settled for the defendant

That a Bill of Exceptions was settled by the Court and filed with Clerk of said Circuit Court on March 31st 1904.

Thereupon the defendant interposed a motion for a new trial, which was, by the Court, duly overruled and an exception allowed and settled for the defendant.

Thereafter this defendant was, by the Court, sentenced to pay a fine of two hundred and fifty dollars ($250.00) and stand committed to the County Jail of Potter County South Dakota until such fine is paid.

Thereafter a certificate of probable cause for a writ of error was granted by the judge of the trial court.

7 This defendant says that there is manifest error on the face of the record by which his substantial rights have been prejudiced. That the statute under which this defendant was informed against, tried, convicted and sentenced, is unconstitutional and void being in conflict with the provision of Article 1, Section 8, Constitution of the United States, which provides "The Congress shall have power; * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes * * * ."

Wherefore:—This defendant prays the Court that a writ of error issue to the Circuit Court of Potter County South Dakota commanding the Clerk of the said Court to forthwith transmit the record in this action to this Court. That the judgment and sentence of said circuit Court may be set aside and this defendant be discharged.

Respectfully submitted.

LEE STOVER,
Attorney for the Defendant.

Watertown, So. Dakota.

8 STATE OF SOUTH DAKOTA, *County of Codington, ss:*

Jay Delameter being duly sworn upon his oath deposes and says that he is the identical person who was the defendant in the case of State of South Dakota *vs.* Jay Delameter, tried in the Circuit Court of Potter County, South Dakota, at the March A. D. 1904 term thereof; that this affiant has read the above and foregoing petition to the Supreme Court of South Dakota for a writ of error to the Circuit Court of Potter County, South Dakota, in said action and knows the contents thereof; that the same is true of his own knowledge; that

this application is not made for the purpose of delay but that justice may be done.

JAY DELAMATER.

Subscribed and sworn to before me this first day of April, 1904.
[SEAL.] LEE STOVER,
Notary Public, South Dakota.

9 [Endorsed:] In the Supreme Court, State of South Dakota. State of South Dakota, Plaintiff and defendant in error, *vs.* Jay Delamater, Defendant and plaintiff in error. Petition for a writ of error to the Circuit court of Potter County. Lee Stover, Watertown, S. D. Attorney for defendant.

[Endorsed:] 2083. Let this writ issue as prayed for and be made returnable to this court at 10 o'clock A. M. on the 12th day of May, A. D. 1904. H. G. Fuller, Judge. Supreme Court State of South Dakota, Filed Ap'r 8 1904. Frank Crane, Clerk.

10 And afterwards, to-wit, on the same day, there was issued in said case, a writ of error, which said writ of error is in words and figures the following, to-wit:

11 *Writ of Error.*

STATE OF SOUTH DAKOTA:

In Supreme Court.

To the Honorable the Circuit Court within and for the County of Potter in the Sixth Judicial Circuit of the State of South Dakota, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment upon the information for selling intoxicating liquors without a license which is in the said Circuit Court before you, wherein Jay Dalamater is convicted of selling liquor without a license, which information is in behalf of the State of South Dakota, and against the said Jay Delamater manifest error hath happened to the great damage of the said Jay Dalamater as by his petition appears.

We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given; That then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the State of South Dakota, together with this writ, so that you may have the same at Pierre, in said State, at the April Term of said Supreme Court, on, to-wit: the twelfth day of May A. D. 1904, and at ten o'clock in the forenoon of said day, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may

cause further to be done therein to correct such error what of right and accordingly to the laws and customs of the State of South Dakota, should be done.

Witness, the Honorable Dighton Corson, Presiding Judge of the said Supreme Court, this eighth day of April in the year of our Lord One Thousand Nine Hundred and four.

FRANK CRANE,
Clerk of the Supreme Court of the State of South Dakota.
[SEAL.] By C. LOUIS ALLEN,
Deputy Clerk.

12 [Endorsed:] State of South Dakota. In Supreme Court. Writ of error. Filed in the office of the Clerk of the Circuit Court, in and for Potter County, South Dakota, this 13 day of April A. D. 1904 at 9:30 A. M. Harry Bolinger, Clerk.

13 And afterwards, to-wit, on the same day, there was issued in said case, a citation, which said citation is in words and figures the following, to-wit:

14 *Citation.*

STATE OF SOUTH DAKOTA:

In Supreme Court.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DALAMATER, Plaintiff in Error.

Citation.

STATE OF SOUTH DAKOTA, *ss:*

To the Attorney General, and to the State's Attorney for Potter County, State of South Dakota, and said Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the State of South Dakota, to be holden at the city of Pierre in said State, at the April Term of said Supreme Court, to be holden on the twelfth day of May, A. D. 1904, at ten o'clock A. M. of that day, pursuant to Writ of Error now issued from the said Supreme Court, wherein Jay Dalamater is Plaintiff in Error, and State of South Dakota is Defendant in Error, to show cause if any there be, why the judgment of conviction of Jay Dalamater in the said Writ of Error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Dighton Corson, Presiding Judge of the

said Supreme Court, this eighth day of April in the year of our Lord One Thousand Nine Hundred and four.

FRANK CRANE,
Clerk of the Supreme Court of the State of South Dakota,
[SEAL.] By C. LOUIS ALLEN,
Deputy Clerk.

15 [Endorsed:] 2083. State of South Dakota. In Supreme Court. State of South Dakota, Defendant in Error, *vs.* Jay Dalamater, Plaintiff in Error. Citation in State Criminal Cases. Due and person- service of the within citation by the delivery of a true copy to me at my office is admitted this 13 day of April, A. D. 1904. Philo Hall, Attorney General, State of South Dakota. S. M. Howard, State's Attorney, Potter County, South Dakota. 2083. Supreme Court, State of South Dakota. Filed May 7, 1904. Frank Crane, Clerk.

16 And afterwards, to-wit, on the 21st day of April, A. D. 1904, there was filed in said case, the record from the lower court, which said record is in words and figures the following, to-wit:

17 *Writ of Error.*

STATE OF SOUTH DAKOTA:

In Supreme Court.

To the Honorable the Circuit Court within and for the County of Potter in the Sixth Judicial Circuit of the State of South Dakota, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment upon the information for selling intoxicating liquors without a license which is in the said Circuit Court before you, wherein Jay Delamater is convicted of selling liquor without a license, which information is in behalf of the State of South Dakota, and against the said Jay Dalamater manifest error hath happened to the great damage of the said Jay Dalamater as by his petition appears.

We being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given; That then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the State of South Dakota, together with this writ, so that you may have the same at Pierre, in said State, at the April term of the said Supreme Court, on, to-wit: the twelfth day of May A. D. 1904, and at ten o'clock in the forenoon of said day, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct such error what of right

and accordingly to the laws and customs of the State of South Dakota, should be done.

Witness, the Honorable Dighton Corson, Presiding Judge of the said Supreme Court, this eighth day of April in the year of our Lord One Thousand Nine Hundred and four.

FRANK CRANE,
Clerk of the Supreme Court of the State of South Dakota,
[SEAL.] By C. LOUIS ALLEN,
Deputy Clerk.

18 [Endorsed:] State of South Dakota. In Supreme Court. Writ of Error. Filed in the office of the Clerk of the Circuit Court, in and for Potter County, South Dakota, this 13 day of April A. D. 1904, at 9:30 A. M. Harry Bolinger Clerk.

19 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In the Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DALAMETER, Defendant.

Clerk's Certificate.

I, Harry Bolinger, Clerk of the Circuit Court within and for said County of Potter in the Sixth Judicial Circuit of the State of South Dakota, do hereby certify and return in obedience to the annexed writ of error that the hereunto attached and foregoing is the full and complete record of this action; to wit. The information, the demurrer to the information, the minutes of the defendant's plea, the trial, all bills of exception including the assignments of error and prayer for reversal, the defendant's motion in arrest of judgment, the defendant's motion for new trial, the sentence and judgment of the Court, the trial judge's certificate for probable cause for writ of error, the statutory certificate of the Judge, the writ of error issued on the 8th day of April A. D. 1904 in the case of the State of South Dakota; plaintiff and defendant in error *vs.* Jay Delamater, defendant and plaintiff in error as the same now remain on record in said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 18th day of April A. D. 1904.

[SEAL.] HARRY BOLINGER,
Clerk of the Circuit Court, Potter County, South Dakota.

20 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Certificate by Trial Judge.

The above named defendant having served a writ of error from the Supreme Court of the State of South Dakota and the record in said cause being required by said Supreme Court, the undersigned, the Judge of said Circuit Court presiding at the said trial of said cause does hereby certify that the record attached hereto contains in itself all the bills of exceptions and a true copy of all of the evidence bearing upon or necessarily relating to the bill of exceptions and a true record of all the proceedings had bearing upon and necessarily relating to the bill of exceptions and a complete record of all the proceedings had in said cause.

Dated at Pierre, South Dakota, this 4. day of April A. D. 1904.

[SEAL.] LORING E. GAFFY,
Judge of the Circuit Court, Sixth Judicial Circuit.

Filed in the Office of the Clerk of the Circuit Court, in and for Potter County, South Dakota, this 6 day of April A. D. 1904 at 10 A. M.

HARRY BOLINGER, *Clerk.*

21 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In the Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DALAMATER, Defendant.

Certificate of Probable Cause for a Writ of Error.

On this 31st day of March, A. D., 1904, this matter coming on before the court at and during the regular March A. D. 1904, term of this court in and for the County of Potter in the State of South Dakota on the application of the defendant, Jay Dalamater, who stands convicted before this court of the Crime of soliciting orders for the sale of intoxicating liquors in quantitites less than five gallons without having first obtained a license so to do as required by Section 2834 of the Compl*i*ed Laws of the State of South Dakota, for a Certificate of Probable Cause for a writ of error in said action and the Court being fully advised in the premises it is hereby ordered, That probable cause for the writ exists and this certificate is accordingly

made and further execution under the judgment in said action heretofore rendered is suspended as provided by law.

Done by the Court, in open Court, this 31st day of March, A. D., 1904.

By the Court,

LORING E. GAFFY, *Judge.*

Pending the appeal in above cause, defendant is allowed to go under bail fixed at the sum of $500.00 cash, to be deposited with the Clerk of this Court.

LORING E. GAFFY, *Judge.*

22 [Endorsed:] Due service of within by copy is admitted this 31st day of March A. D. 1904. S. R. Henely, Sheriff of Potter county, South Dakota. Filed in the office of the Clerk of the Circuit Court in and for Potter County, South Dakota this 31 day of March A. D. 1904 at 10 o'clock A. M. —— ——, Clerk

23 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Bill of Exceptions.

24 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

At the regular March term A. D., 1904 *term* of said Court. Before Loring E. Gaffy, presiding Judge.

Present: S. M. Howard, State's Attorney, Attorney for Plaintiff. Lee Stover and A. J. Brower, Attorneys for Defendant. All officers of said Court.

MARCH 29TH, 1904.

The following information was filed against the defendant Jay Delamater by S. M. Howard, State's Attorney, of Potter County, South Dakota.

25 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court of Sixth Circuit, March Term, A. D. 1904.

THE STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

I, Samuel M. Howard, the undersigned State's Attorney, in and for said County and state, in the name and by the authority of the State of South Dakota, hereby inform the court and give the court to understand, that said Jay Delamater on the 10th day of February, A. D., One Thousand Nine Hundred and Four, at and within the County of Potter and State of South Dakota, was then and there a person whose business consisted, in whole or in part in unlawfully selling, or offering for sale spirituous, vinous, malt, brewed, fermented, or other intoxicating liquors as a traveling salesman who then and there unlawfully solicited orders for such intoxicating liquors by the jug, bottle or other vessel in lots of less quantity than five gallons each at one time, and without having first paid the license to said county of Potter or to the Treasurer thereof as required by Sec. 2834 of the Revised Political Code of the year 1903 of the state of South Dakota; the said Jay Delamater not then and there having paid any license to any township, precinct town or city within said county of Potter; and said liquors not being proprietary patent medicines, and the said Jay Delamater not then and there being a licensed pharmacist, against the form of the statute in such case made and provided, and against the peace and dignity of the state of South Dakota, and prays that the said Jay Delamater may be arrested and dealt with according to law.

SAMUEL M. HOWARD,
State's Attorney in and for the County of Potter, State of South Dakota.

Subscribed and sworn to before me this 29th day of March, A. D., 1904.

[SEAL.] HARRY BOLINGER,
Clerk of Court.

26 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

Samuel M. Howard, being first duly sworn, deposes and says; that he is the State's Attorney in and for Potter County, S. D., that he has read the foregoing information and knows the contents thereof and that the same is true, according to his best information and belief.

SAMUEL M. HOWARD.

Subscribed and sworn to before me this 29th day of March, A. D. 1904.

HARRY BOLINGER,
[SEAL.] *Clerk of Court.*

Witnesses in the within entitled action whose names are known to the State's Attorney:—Ferdinand Renner, Paul Gross, William H. Clark.

(Indorsed on Back of Paper.)

Information No. —, March Term, A. D. 1904.

STATE OF SOUTH DAKOTA, *Sixth Judicial Circuit:*

In the Circuit Court within and for the County of Potter.

STATE OF SOUTH DAKOTA
vs.
JAY DELAMATER.

Information for selling or offering for sale intoxicating liquors in less quantities than five gallons each, without a license therefore.

Presented in open court by the State's Attorney in and for Potter County, state of South Dakota, and filed as a record of the Court, this 29th, day of March, 1904.

HARRY B-LINGER, *Clerk.*
SAMUEL M. HOWARD,
State's Attorney.

27 Whereupon the defendant, Jay Delamater at said time and place appeared in person and represented by Counsel waived the reading of the information, waived time in which to plead and subject to the right to withdraw his plea if he later so desired, duly entered his plea of "Not Guilty" to the offence charged in the information.

MARCH 30TH, 1904.

On the application of the defendant made in open Court Leave was granted by the Court to the defendant to withdraw his plea of not guilty and to file a demurrer.

Whereupon the defendant filed the following demurrer.

STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In the Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Demurrer.

Comes now the defendant in the above entitled action and demurrers to the information filed therein by the State's Attorney, against the defendant on the 29th day of March, A. D., 1904, and as and for the ground of said demurrer assigns.

That the facts stated in said information do not constitute a public offence.

LEE STOVER,
Attorney for Defendant.

Which demurrer after argument was by the Court duly overruled and an exception to said ruling allowed to and entered for the defendant.

Whereupon the defendant in person then entered of record his plea of not Guilty to the offense charged in the information.

Whereupon the above entitled action was brought on for trial to the court and jury.

28 A jury was duly called empannelled and sworn to try the case and the following testimony was introduced.

"That the defendant, Jay Delamater, is now and was on the 10th day of February, A. D., 1904, a travelling salesman employed by Lewis L. Metzger & Co., and that the said Lewis L. Metzger & Co., are residents of the city of St. Paul, in the state of Minnesota, and that said Lewis L. Metzger and Company have their place of business at the said City of St. Paul and have no place of business in the state of South Dakota, and have had no such place of business in the said state of South Dakota. That on the 10th day of February, A. D., 1904, Jay Delamater as such employee was engaged as said travelling salesman in soliciting proposals or orders for said Lewis L. Metzger & Co. for the sale of intoxicating liquors in quantities less than five gallons from citizens and residents of and within the County of Potter and State of South Dakota who were not merchants, traders or dealers in intoxicating liquors; That on said date he solicited and requested proposals or orders from Ferdinand Renner and Paul Gross who were not merchants, traders or dealers in intoxicating liquors, at and in the County of Potter and state of South Dakota, soliciting or requesting proposals or orders from said last named persons for the sale to them by Lewis L. Metzger & Co. of said intoxicating liquors. That the said proposals and orders were procured for defendant from said named persons, forwarded to his principal, the said Lewis L. Metzger & Co. in the City of St. Paul, state of Minnesota. At said time no money was paid by either of the said persons to the said defendant or to said Lewis L. Metzger & Co. and said proposals or orders were forwarded with the understanding that they were subject to the approval of the said Lewis L. Metzger & Co. and that the defendant had no power or authority to approve said proposals or order- nor to receive any money thereon. In addition to being subject to the approval of said Lewis L. Metzger & Co. said proposals or orders were conditioned that the said whiskey so ordered should be delivered to the said Ferdinand Renner and Paul Gross hereinbefore named, f. o. b. cars at the city of St. Paul in the state of Minnesota. That the said Ferdinand Renner and Paul Gross hereinbefore named were to pay the freight from the city of
29 St. Paul in the state of Minnesota and were to make remittance of the purchase price of said goods to said Lewis L.

Metzger & Co. at the city of St. Paul in the state of Minnesota within sixty days after receipt of said liquor in said County of Potter. That this defendant has never paid any license to the County of Potter or State of South Dakota or to the treasurer or to anyone as required by Section 2834 of the Revised Political Code of the year 1903 of the State of South Dakota, and that the said defendant had not then and there and has never paid any license or fee whatsoever to any township, precinct, town or city within the said county or state and that said liquor therein sold was intoxicating liquor, to-wit: whiskey, and was not a proprietary patent medicine and that the said defendant is not now and never has been a licensed pahrmacist under the laws of the state of South Dakota."

The taking of testimony having been concluded both sides having rested their case the following motion was interposed by the defendant "By Mr. Stover. At this time the defendant asks the Court to advise the jury to return a verdict for the defendant upon all the issues, for the reason that it affirmatively appears from the evidence and the uncontradicted evidence of the state that no offense has been committed; that it affirmatively appears that no sale was made within the state of South Dakota and for the further reason that the statute under which the prosecution is brought is unconstitutional and void, in that it is in conflict with Section 8 of Article 1 of the Constitution of the United States, which places in congress the sole and exclusive right and authority to regulate and control interstate commerce. It affirmatively appears in this case from the uncontradicted testimony that that was and is a transaction involving and being Interstate Commerce business, being a sale made in the state of Minnesota on proposals or orders received in the state of South Dakota subject to the approval of the principal in the State of Minnesota; that the goods were to be delivered to the parties who are named as purchasers in the state of Minnesota, the freight to be paid from the City of St. Paul in the state of Minnesota by said purchasers; that the said act under which said prosecution is drawn in unconstitutional and void, being in direct conflict with the powers of the Congress of the United States, and of Section 8 of Article 1 of the Federal Constitution.

Which said motion of the defendant was by the Court after argument duly overruled and an exception allowed to and entered of record for the defendant.

Thereupon the court instructed the jury and after retiring for deliberation the jury duly returned into Court and rendered the following verdict.

"We, the jury find the defendant guilty as charged in the information."

Which said verdict was duly entered of record and an exception for the defendant to the said verdict was allowed by the Court and duly entered of record for the said defendant.

The court fixed on March 31st, A. D., 1904 at 9 o'clock A. M. at the opening of Court as the time and place where the judgment of the Court would be pronounced against the defendant.

On March 31st at 9 A. M. on the opening of Court the defendant appearing in person and by counsel the following motion in arrest of judgment was interposed by the defendant.

STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Defendant's Motion in Arrest of Judgment.

Comes now the defendant, Jay Delamater, and moves the Court that no judgment be rendered against him on the verdict of guilty, as returned by the jury in this Court and as and for the grounds of said motion assigns.

1. That the facts stated in the information filed against this defendant in this action do not constitute a public offence.
2. That the act or law under which the information in this action is drawn is unconstitutional and void, said act being in con-
31 flict with Article 1, Section 8, of the Constitution of the United States, the said law being an attempt by the Legislature of the state of South Dakota to hamper, interfere with and restrict Interstate Commerce.

Respectfully submitted.

LEE STOVER,
Attorney for the Defendant.

Which said motion in arrest of Judgment was by the Court on each and every ground duly overruled and denied and an exception to the ruling of the Court on the said motion in arrest of judgment was allowed to and entered of record for the Defendant.

Whereupon the defendant duly presented and filed his following motion for a new trial in said action.

32 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Motion for a New Trial.

Now comes the above named defendant, Jay Dalamater, and shows to the Court that his substantial rights *has* been prejudiced and because thereof moves the Court for a new trial in the above entitled

action and as and for the grounds of said motion assigns the following error- committed by this Court on the trial of said action.

I.

That the Court erred in overruling the defendant's demurrer to the information filed against him in this action.

II.

That the Court erred in denying the motion made by this defendant, at the close of the testimony, to advise the jury to return a verdict for this defendant.

III.

That the Court erred in denying this defendant's motion made in arrest of judgment after the jury returned a verdict finding this defendant guilty as charged in the information.

IV.

That the law under which the information in this case was filed and on which this defendant was tried and found guilty by the jury is unconstitutional and void, because said law is in conflict with Article 1, Section 8 of the Constitution of the United States, said law being an attempt by the legislature of the State of South Dakota to regulate, restrain and interfere with interstate commerce.

Respectfully submitted, LEE STOVER,
Attorney for the Defendant.

33 Which said motion for a new trial after argument by counsel was by the Court on each and every ground duly overruled and denied and to the said ruling denying the defendant's motion for a new trial and to the adverse rule denying each and every ground of said motion for a new trial, an exception was allowed to and entered of record for the defendant. Whereupon the following sentence and judgment was pronounced by the Court.

STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

Present: Hon. Loring E. Gaffy, Judge of said Court and the officers of the said Court:

THE STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Convicted of the Crime of Selling or Offering for Sale Intoxicating Liquors in Less Quantities Than Five Gallons Each Without a License Therefor.

Now on this 31st day of March, A. D., 1904, the State's Attorney and the defendant, Jay Delamater, being in Court and this being the day fixed by the Court for the pronouncing of judgment upon conviction of the defendant for the crime of "selling or offering for sale intoxicating liquors in less quantities than five gallons each, without a license therefor" as charged in the information on file against this defendant in this Court and the defendant being informed by the Court of the nature of the information, of his plea of not guilty and of the verdict and being asked whether he had any legal cause to show why judgment should not be pronounced against him and no cause being shown the Court does Adjudge and the sentence is, That you, Jay Delamater, pay a fine of Two Hundred and fifty Dollars, ($250.00). And in default of said fine that you be imprisoned in the County jail of Potter County, South Dakota for the period of 125 days, being one day for every two dollars of said fine or until said fine shall be paid and that you stand committed until this sentence be complied with.

By the Court,

LORING E. GAFFY, *Judge.*

Attest:
HARRY BOLINGER,
[SEAL.] *Clerk of Circuit Court, Potter County, S. D.*

Defendant has an exception to the sentence and judgment.

34 *Assignments of Error.*

The defendant, Jay Delamater, assigns the following as errors occurring at the trial of said cause, that said assignments are agreed to, and are settled and allowed by the Court.

I.

That the trial Court erred in overruling the defendant's demurrer to the information filed against him in this action.

II.

That the trial court erred in overruling and denying the defendant's motion to direct the jury to return a verdict for the defendant being the motion made by the defendant at the conclusion of the testimony.

III.

That the verdict returned by the jury in said cause is contrary to law in particular for that the undisputed evidence and all of the evidence disclosed the transaction was one involving Interstate Commerce, and was outside and beyond the jurisdiction of the law of the State of South Dakota, and that the law under which the information was drawn and the verdict found is unconstitutional and void, being in conflict with Article 1 Section 8 of the Constitution of the United States.

IV.

That the trial Court erred in overruling the defendant's motion made in arrest of judgment.

V.

That the trial Court erred in overruling the defendant's motion for a new trial made prior to the entry of sentence and judgment against him.

VI.

That the trial Court erred in pronouncing judgment and sentence against the defendant, for that the law of the state of South Dakota under which the information was filed verdict returned and sentence pronounced is unconstitutional and void being in conflict with Article 1, Section 8 of the Constitution of the United States.

35 Wherefore defendant prays that the judgment of the trial Court may be reversed and that the defendant be discharged or the sentence be modified and that the Supreme Court may make such further order and disposition of said cause as the circumstances of the case may require.

LEE STOVER,
Attorney for the Defendant.

36 It is hereby stipulated that the above and foregoing consisting of thirteen sheets of typewritten matter may be settled and allowed as a bill of exceptions in the case of State of South Dakota, plaintiff *vs.* Jay Delamater, Defendant, and said bill of exceptions may be settled and signed by the Hon. Loring E. Gaffy, presiding Judge, without further notice and that each of the parties agree to the same as the Bill of Exceptions in the said action.

S. M. HOWADR,
State's Attorney, Potter County, South Dakota, Attorney for the Plaintiff.
LEE STOVER,
Attorney for Defendant.

37 *Certificate by the Court.*

Upon a full and careful examination of the foregoing exceptions and finding the same correct I hereby certify the same to be correct and to contain the information, the demurrer by the defendant, the plea of the defendant, all of the evidence which was given upon the trial, all of the objections by counsel, all of the rulings of the Court thereon, the exceptions taken by the defendant, the verdict of the Jury, the motion of the defendant in arrest of judgment, the motion of the defendant for a new trial, the sentence and judgment of the Court, and the assignments of errors by the defendant.

Done by the Court, in open Court at Gettysburg, S. D., this 31st day of March, A. D., 1904.

By the Court.

LORING E. GAFFY, *Judge.*

38 [Endorsed] State of South Dakota County of Potter. Circuit Court Sixth Circuit. State *v.* Dalamater. Bill of Exceptions. Filed in the office of the Clerk of the Circuit Court in and for Potter County, South Dakota, this 31 day of March, A. D. 1904 at 10 A. M. —— ——, Clerk.

39 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

THE STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Present: Hon. Loring E. Gaffy, Judge of said Court and the officers of the said Court:

Convicted of the Crime of Selling or Offering for Sale Intoxicating Liquors in Less Quantities Than Five Gallons Each Without a License Therefore.

Now, on this 31st day of March, A. D., 1904, the State's Attorney and the defendant, Jay Delamater, being in Court and this being the day fixed by the Court for the pronouncing of judgment upon conviction of the Defendant for the crime of "selling or offering for sale intoxicating liquors in less quantities than five gallons each without a license therefor" as charged in the information on file against this Defendant in this Court, and the Defendant being informed by the Court of the nature of the information, of his plea of not guilty and of the verdict and being asked whether he had any legal cause to show why judgment could not be pronounced against him, and no cause being shown, the Court does Adjudge and the sentence is, That you, Jay Delamater, pay a fine of Two Hundred fifty Dollars,

($250.00); and in default of said fine that you be imprisoned in the County jail of Potter County, South Dakota for the period of 125 days, being one day for every two dollars of said fine or until said fine shall be paid and that you stand committed until this sentence be complied with.

By the Court,

LORING E. GAFFY, *Judge.*

Attest:

[SEAL.] HARRY BOLINGER, *Clerk.*

40 [Endorsed:] Filed in the office of the Clerk of the Circuit Court in and for Potter County, South Dakota, this 31 day of March A. D. 1904 at 9:30 A. M. —— ——, Clerk. Recorded in Judgment Book on page 431. Fee 75 cts.

41 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,

vs.

JAY DELAMATER, Defendant.

Motion for a New Trial.

Now comes the above named defendant, Jay Delamater, and shows to the Court that his substantial rights *has* been prejudiced and because thereof moves the Court for a new trial in the above entitled action and as and for the ground of said motion assigns the following error committed by this Court on the trial of said action.

I.

That the Court erred in overrul*l*ing the defendant's demurrer to the information filed against him in this action.

II.

That the Court erred in denying the motion made by this defendant, at the close of the testimony, to advise the jury to return a verdict for this defendant.

III.

That the Court erred in denying this defendant's motion made in arrest of judgment after the jury returned a verdict finding this defendant guilty as charged in the information.

IV.

That the law under which the information in this case was filed and on which this defendant was tried and found guilty by the jury

is unconstitutional and void, because said law is in conflict with Article 1, Section 8 of the Constitution of the United States, said law being an attempt by the legislature of the State of South Dakota to regulate, restrain and interfere with Interstate Commerce.

Respectfully submitted,

LEE STOVER,
Attorney for the Defendant.

Upon presentation of the foregoing motion in open court, the same, is in all things overrul/ed and the defendant has an exception.

March 31st, 1904.

By the Court,

LORING E. GAFFY, *Judge.*

42 [Endorsed:] Filed in the office of the Clerk of the Circuit Court in and for Potter County, South Dakota, this 31 day of March, A. D. 1904 9:00 A. M. Harry Bolinger, Clerk.

43 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DALAMATER, Defendant.

Defendant's Motion in Arrest of Judgment.

Comes now the defendant, Jay Dalamater, and moves the Court that no judgment be rendered against him on the verdict of guilty, as returned by the Jury in this Court and as and for the grounds of said motion assigns.

1. That the facts stated in the information filed against this defendant in this action do not constitute a public offence.

2. That the act or law under which the information in this action is drawn is unconstitutional and void, said act being in Conflict with Article 1, Section 8, of the Constitution of the United States, the said law being an attempt by the Legislature of the state of South Dakota to hamper, interfere with and restrict interstate Commerce.

Respectfully submitted,

LEE STOVER,
Attorney for the Defendant.

Upon presentation of the foregoing Motion in open Court, the same is in all things overruled and the defendant has an exception.

March 31st, 1904.

By the Court,

LORING E. GAFFY, *Judge.*

44 [Endorsed:] Filed in the office of the Clerk of the Circuit Court in and for Potter County, South Dakota this 31 day of Mar. A. D. 1904, 9:30 A. M. Harry Bolinger, Clerk.

45 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DALAMATER, Defendant.

Demurrer.

Comes now the defendant in the above entitled action and demurrs to the information filed herein by the State's Attorney, against this defendant on the 29th day of March, A. D., 1904, and as and for the ground of said demur- assigns.

That the facts stated in said information do not constitute a public offence.

LEE STOVER,
Attorney for Defendant.

Filed in the Office of the Clerk of the Circuit Court in and for Potter County; South Dakota, this 30 day of March A. D. 1904 at 9 A. M.

HARRY BOLINGER, *Clerk.*

[Endorsed:] Demurrer.

46 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

Minutes of the Journal.

A regular term of the Circuit Court of the Sixth Judicial Circuit in and for the County of Potter, State of South Dakota.

Regular March A. D. 1904 term of said Court.

Loring E. Gaffey, Presiding Judge.

Present: All the officers of the Court.

S. M. Howard, State's Attorney of Potter County, Attorney for Plaintiff.

Lee Stover, Attorney for the Defendant.

MARCH 29, 1904.

Information filed by S. M. Howard, State's Attorney of Potter County, S. D., against Jay Delamater charging said Jay Delamater with "Selling or offering for sale intoxicating liquors in less quantities than five gallons each without a license therefor."

Defendant, Jay Delamater, appears in person and by Lee Stover, his attorney, waived the reading of the information, waived time in which to plead and subject to the right to withdraw his plea if he later so desired, duly entered his plea of "not guilty" to the offense charged in the information.

MARCH 30, 1904.

On application of the defendant — the case of the State of South Dakota *vs.* Jay Delamater, Defendant, made in open court, leave was granted by the Court to the defendant to withdraw his
47 plea of "not guilty" and to file a demurrer.

Demurrer filed by the defendant.

After argument the demurrer was, by the Court, overruled and the defendant has an exception.

The defendant, Jay Delamater, pleads "not guilty" to the offense charged in the information.

Jury called and sworn in the case of the State of South Dakota *vs.* Jay Delamater.

The State offers their testimony.

At the conclusion of the testimony the defendant moves the Court to advise the jury to return a verdict of "not guilty."

The request to advise the jury is, by the Court, denied and the defendant has an exception.

The jury were instructed by the Court.

Bailiff sworn and the jury retired.

The jury in the case of the State of South Dakota *vs.* Jay Delamater returned into court and reported that they have agreed upon a verdict.

Defendant present in person and by counsel.

The jury return the following verdict:

"We, the jury find the defendant guilty as charged in the information."

The defendant excepts to the verdict.

The Court fixed 9:30 o'clock A. M. on March 31, 1904, at the opening of Court as the time and place where the judgment of the Court would be pronounced against the defendant.

MARCH 31, 1904.

— The case of the State of South Dakota *vs.* Jay Delamater the defendant appeared in person and by counsel and filed a motion in arrest of judgment which was by the Court denied and the defendant had an exception.

48 The defendant files a motion for a new trial.

Motion for new trial argued and denied by the Court and defendant has an exception.

Defendant Jay Delamater called for sentence, and the Court sentences him to pay a fine of two hundred and fifty dollars ($250.00) and in default of payment he be imprisoned in the county jail of Potter County South Dakota for one hundred and twenty-five days (125). Defendant has an exception to the sentence and judgment.

Writ and judgment filed.

Bill of exceptions with assignment of error settled by the Court and filed.

Certificate for probable cause for writ of error signed by the Court and filed.

Order entered that "Pending the appeal in above cause defendant is allowed to go under bail fixed at the sum of $500.00 cash to be deposited with the Clerk of this Court."

Lee Stover deposits $500.00 cash with the Clerk of this Court as security as provided by above order.

I, Harry Bolinger, Clerk of the Circuit Court within and for said County of Potter in the sixth Judicial Circuit of the State of South Dakota do hereby certify and return that the foregoing is a true and correct copy of the minutes of the Journal of the March A. D. 1904 term of said Circuit Court in witness whereof I have hereunto set my hand and affixed the seal of said court at Gettysburg, South Dakota this 15 day of April A. D. 1904.

[SEAL.]

HARRY BOLINGER,
Clerk of Circuit Court,
Potter County, South Dakota.

49 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In Circuit Court, Sixth Judicial Circuit.

STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DALAMATER, Defendant.

Before Loring E. Gaffy, Presiding Judge.

Present: S. M. Howard, State's Attorney, Attorney for the Plaintiff. Lee Stover and A. J. Brower, Attorneys for Defendant. All officers of the said Court.

The following proceedings were had on March 29th, 1904:

Defendant waives reading of information and asks for copy of same, waives time to plead and enters a plea of not guilty.

The following proceedings were had on March 30th, 1904: An application made in open court leave was granted to the defendant to withdraw his plea of not guilty and to file a demurrer. Demurrer interposed to information which is overruled and an exception taken, whereupon the defendant pleaded "Not Guilty" to the offence charged in the information.

The above entitled action having been brought on for trial on this 30th day of March, 1904, at the regular 1904 adjourned term of the Circuit Court in and for Potter County, State of South Dakota, the following proceedings were had, to-wit: (Jury called and sworn to try the cause.)

JAY DELAMATER having been called and sworn in behalf of the plaintiff testifies as follows:

That the defendant Jay Delamater, is now and was on the 10th day of February, A. D. 1904, a travelling salesman employed by Lewis L. Metzger & Co., and that the said Lewis L. Metzger & Co. are residents of the City of St. Paul in the state of Minnesota
50 and that the said Lewis L. Metzger and Company have their place of business at the said City of St. Paul and have no place of business in the State of South Dakota, and have had no such place of business in the said state of South Dakota, that on the 10 day of February A. D. 1904 as such employee was engaged as said travelling salesman in soliciting said proposals or orders for said Lewis L. Metzger & Co. for the sale of intoxicating liquors in quantities less than 5 gallons from citizens and residents of and within the County of Potter and State of South Dakota who were not merchants, traders or dealers in intoxicating liquors; that on said date he solicited and requested proposals or orders from Ferdinand Renner and Paul Gross who were not merchants, traders or dealers in intoxicating liquors at and in the County of Potter and state of South Dakota soliciting or requesting proposals of orders from said last named persons for the sale to them by Lewis L. Metzger & Co. of said intoxicating liquors. That the said proposals and orders were made by said defendant, forewarded to his principal, the said Lewis L. Metzger & Co. in the city of St. Paul, state of Minnesota. At said time no money was paid by either of the said persons to the said defendant or to said Lewis L. Metzger & Co. and said proposals or orders were forewarded with the understanding that they were subject to the approval of said Lewis L. Metzger & Co. and that the defendant had no power or authority to approve said proposals or order- nor to receive any money thereon. In addition to being subject to the approval of the said Lewis L. Metzger & Co. said proposals or orders were conditioned that the said whiskey so ordered should be delivered to the said Ferdinand Renner and Paul Gross hereinbefore named f. o. b. cars at the city of St. Paul in the state of Minnesota and were to make remittance of the purchase price of said goods to said Lewis L. Metzger & Co. at the city of St. Paul in the state of Minnesota within sixty days after receipt of said liquor in said county of Potter. That this defendant has never paid any license to the County of Potter or the State of South Dakota or to the treasurer or to any one as required by Section 2834 of the Revised Code of the year
51 1903 of the state of South Dakota and that the said defendant had not then and there has never paid any license or fee whatsoever to any township, precinct town or city within the said county or state and that said liquor therein sold was intoxicating liquor, to-wit: whiskey, and was not a proprietary patent medicine and that the said defendant is not now and never has been a licensed pharmacist under the laws of the state of South Dakota.

By Mr. HOWARD:

Q. I will ask you who this party named in that statement as Jay Dalameter is?

A. Myself.

(Witness excused.)
Plaintiff rests.
Defendant rests.

Mr STOVER: At this time the defendant asks the Court to request the jury to return a verdict for the defendant upon all the issues, for the reason that it affirmatively appears from the evidence and the uncontradicted evidence of the state that no offence has been committed; that it affirmatively appears that no sale was made within the state of South Dakota and for the further reason that the statute under which the prosecution is brought is unconstitutional and void, in that it is in conflict with section 8 of article 1 of the constitution of the United States, which places in Congress the sole and exclusive right and authority to regulate and control interstate commerce. It affirmatively appears in this case from the uncontradicted testimony that this was and is a transaction involving and being interstate commerce business, being a sale made in the state of Minnesota on proposals or orders received in the State of South Dakota subject to the approval of the principal in the state of Minnesota; that the goods were to be delivered to the parties who are named as
52 purchasers in the state of Minnesota, the freight to be paid from the city of St. Paul, in the state of Minnesota by said purchasers;

That the said act under which said prosecution is drawn — unconstitutional and void, being in direct conflict with the powers of the congress of the United States and of section 8 of Article 1 of the Federal Constitution.

By the COURT: Motion is denied.

By Mr. STOVER: An exception.

Whereupon after the Court having instructed the jury and they having retired for deliberation they return into Court the following verdict: We the jury, find the defendant duly guilty as charged in the information.

By Mr. STOVER: An exception on the part of the defendant.

I hereby certify that the above and foregoing contains a full true, correct and complete transcript of my notes taken on the trial — before mentioned cause of the oral evidence educed, objections of counsel, ruling of the Court and of all proceedings save and except the instructions to the jury.

Dated this 30 day of March 1904.

W. S. LITTLE,
Official Stenographer, Sixth Judicial Circuit of the State of South Dakota.

Filed in the office of the Clerk of the Circuit Court in and for Potter County, South Dakota, this 31 day of March, A. D. 1904 at 9-2 A. M.

HARRY BOLINGER, *Clerk.*

53 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

In the Circuit Court of the Sixth Circuit, March Term, A. D. 1904.

THE STATE OF SOUTH DAKOTA, Plaintiff,
vs.
JAY DELAMATER, Defendant.

I, Samuel M. Howard, the undersigned State's Attorney, in and for said county and state, in the name and by the authority of the State of South Dakota, hereby inform the court and give the court to understand, that said Jay Delamater on the 10th day of February, A. D. One Thousand Nine Hundred and Four, at and within the county of Potter and state of South Dakota, was then and there a person, whose business consisted, in whole or in part, in unlawfully selling or offering for sale spiritous, vinous, malt, brewed, fermented, or other intoxicating liquors as a traveling salesman who then and there unlawfully solicited orders for such intoxicating liquors by the jug, bottle or other vessel, in lots of less quantity than five gallons each at one time, and without having first paid the license to said county of Potter or to the Treasurer thereof as required by Sec. 2834 of the Revised Political Code of the year 1903 of the State of South Dakota; the said Jay Delamater not then and there having paid any license to any township, precinct, town or city within said county of Potter; and said liquors not being proprietory patent medicines, and the said Jay Delamater not then and there being a licensed pharmacist, agains- the form of the statute in such case made and provided, and against the peace and dignity of the state of South Dakota, and prays that the said Jay Delamater may be arrested and dealt with according to law.

SAMUEL M. HOWARD,
State's Attorney in and for the County of Potter, State of South Dakota.

Subscribed and sworn to before me on this 29 day of March A. D. 1904.

[SEAL.] HARRY BOLINGER,
Clerk of Court.

54 STATE OF SOUTH DAKOTA, *County of Potter, ss:*

Samuel M. Howard, being first duly sworn, deposes and says: that he is the State's Attorney in and for Potter County, S. D.; that he has read the foregoing information and knows the contents thereof and that the same is true, according to his best information and belief.

SAMUEL M. HOWARD.

Subscribed and sworn to before me this 29 day of Mar. A. D. 1904.

HARRY BOLINGER,
[SEAL.] *Clerk of Court.*

Witnesses in the within entitled action, whose names are known to the State'- Attorney:—Ferdinand Renner, Paul Gross, William H. Clark.

55 [Endorsed:] Information No. —. March Term, A. D. 1904. State of South Dakota, Sixth Judicial Circuit. In the Circuit Court within and For the County of Potter. State of South Dakota *vs.* Jay Delamater. Information for selling or offering for sale intoxicating liquors in less quantities than five gallons each without a license therefor. Pres*ne*ted in open court by the State's Attorney in and for Potter County, state of South Dakota, and filed as a record of the court, this 29 day of March 1904. Harry Bolinger, Clerk. Samuel M. Howard, State's Attorney.

56 [Endorsed:] 2083. State of South Dakota, Circuit Court Potter County. State of South Dakota, Plaintiff, *vs.* Jay Delamater, Defendant. Due and personal service of the within information is hereby admitted this 29 day of March 1904. Lee Stover, A. J. Brower, Attorney- for Defendant. S. M. Howard Attorney for Plaintiff. Supreme Court. State of South Dakota. Filed Apr. 21, 1904. Frank Crane, Clerk.

[Endorsed:] Judgment Roll. Filed this April 19, 1904, at 10 A. M. Harry Bolinger, Clerk.

57–73 And afterwards, to wit: on the 7th day of May, A. D. 1904 there was filed in said case a brief of plaintiff in error which said brief is in words and figures the following, to wit:

* * * * * * *

74–86 And afterwards, to-wit: on the same day there was filed in said case an abstract of Plaintiff in Error which abstract is in words and figures following, to-wit:

* * * * * * *

87 That afterwards on the same day, the citation issued in this court on April 8th, was returned and filed in this court, which citation is in words and figures as follows, to-wit:

88 *Citation.*

STATE OF SOUTH DAKOTA:

In Supreme Court.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DALAMETER, Plaintiff in Error.

Citation.

STATE OF SOUTH DAKOTA, *ss:*

To the Attorney General and to the State's Attorney for Potter County, State of South Dakota, and said Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the State of South Dakota, to be holden at the city of Pierre in said State, at the April Term of said Supreme Court, to be holden on the twelfth day of May, A. D. 1904, at ten o'clock A. M. of that day, pursuant to Writ of Error now issued from the said Supreme Court, wherein Jay Dalamater is Plaintiff in Error, and State of South Dakota is Defendant in Error, to show cause if any there be, why the judgment of conviction of Jay Dalamater in the said Writ of Error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Dighton Corson, Presiding Judge of the said Supreme Court, this eighth day of April in the year of our Lord One Thousand Nine Hundred and four.

FRANK CRANE,
Clerk of the Supreme Court of the State of South Dakota.
By C. LOUIS ALLEN,
Deputy Clerk.

[SEAL.]

89 [Endorsed:] State of South Dakota. In Supreme Court. State of South Dakota Defendant in Error, *vs.* Jay Delamater Plaintiff in error. Citation in State Criminal Cases. Due and person- service of the within citation by the delivery of a true copy to me at my office is admitted this 13 day of April, A. D. 1904. Philo Hall, Attorney General, State of South Dakota. S. M. Howard, State's Attorney, Potter County, South Dakota. Supreme Court, State of South Dakota. Filed May 7, 1904. Frank Crane, Clerk.

90 The case was called and ordered on the Calendar on May 12th, A. D. 1904, and placed on the Calendar on the same date.

91–150 And again on May 24th, A. D. 1904 the brief of Defendant in Error by the State's Attorney was filed, which said brief is in words and figures as follows, to-wit:

* * * * * * *

151–221 And afterwards, to-wit: on the 25th day of May, A. D. 1904 the brief of Defendant by the Attorney Gen-ral was filed, which said brief is in words and figures as follows, to-wit:

* * * * * * *

222 And afterwards on the same day the case was called on its merits and argued by counsel, and taken under advisement:

223 And afterwards on August 22nd, A. D. 1905 the following proceedings were had, to-wit:

224 File No. 2083.

In the Supreme Court, State of South Dakota, April Term, A. D. 1905.

Present: Dighton Corson, Presiding Judge, Howard G. Fuller and Dick Haney, Judges of said Court, and the officers thereof.

STATE OF SOUTH DAKOTA, Plaintiff and Defendant in Error,
vs.
JAY DELAMATER, Defendant and Plaintiff in Error.

This action coming on to be heard at the April A. D. 1904 Term of this Court, at the Supreme Court Room, in the City of Pierre, State of South Dakota, upon the merits of the case, and argued by counsel and the Court having advised thereon and filed its decision in writing.

It is Considered, Ordered and Adjudged that the judgment of the Circuit Court within and for Potter County, appealed from herein, be and the same is hereby affirmed.

And it is Further Ordered that this action be and it is hereby remanded to said Circuit Court for further proceedings according to law and the decision of this Court.

By the Court,

D. CORSON,
Presiding Judge.

Attest:
FRANK CRANE, *Clerk.*
By C. LOUIS ALLEN, *Deputy.*

225 [Endorsed:] File No. 2083. In the Supreme Court State of South Dakota. April Term, 1905 State of South Dakota, Plaintiff and Def't In Error, *vs.* Jay Delamater, Defendant and Plff. in Error. Filed in open Court this 22 day of August 1905 Frank Crane, Clerk. By C. Louis Allen Deputy. Remittitur sent down —— Recorded in Judgment Book 6 Page 122

226 "H"—*a*— 2083.

In the Supreme Court, State of South Dakota.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DELAMATER, Plaintiff in Error.

Writ of Error.

Opinion. Filed August 22nd, 1905.

227 Lee Stover, for Plaintiff in Error.
Philo Hall, Attorney General, S. M. Howard, State's Attorney, and Aubrey Lawrence (of counsel), for Defendant in Error.

HANEY, *J.:*

The evidence upon which the defendant was convicted is conceded to have established the following facts: "That the defendant, Jay Delamater, is now and was on the 10th day of February, A. D., 1904, a traveling salesman employed by Lewis L. Metzger & Co., and that the said Lewis L. Metzger & Co. are residents of the city of St. Paul, in the state of Minnesota, and that the said Lewis L. Metzger & Co., have their place of business at the said city of St. Paul, and have no place of business in the state of South Dakota, and have had no such place of business in the said state of South Dakota. That on the 10th day of February, A. D., 1904, Jay Delamater, as such employe, was engaged as said traveling salesman in soliciting proposals or orders for said Lewis L. Metzger & Co. for the sale of intoxicating liquors in quantities less than five gallons, from citizens and residents of and within the county of Potter and state of South Dakota, who were not merchants, traders or dealers in intoxicating liquors; that on said date he solicited and requested proposals or orders from Ferdinand Renner and Paul Gross, who were not merchants, traders, or dealers in intoxicating liquors, at and in the county of Potter and state of South Dakota, soliciting or requesting proposals or orders from said last named persons for the sale to them by Lewis L. Metzger & Co. of said intoxicating liquors. That the said proposals and orders were procured by defendant from said named persons, forwarded to his principal, the said Lewis L. Metzger & Co., in the city of St. Paul, state of Minnesota. At said time no money was paid by either of the said persons to said defendant or to said Lewis L. Metzger &
228 Co., and said proposals or orders were forwarded with the understanding that they were subject to the approval of said Lewis L. Metzger & Co., and that the defendant had no power or authority to approve said proposals or orders, nor to receive any money thereon. In addition to being subject to the approval of said Lewis L. Metzger & Co., said proposals or orders were conditioned that the said whiskey so ordered should be delivered to the said Ferdinand Renner and Paul Gross, hereinbefore named, f. o. b. cars

at the city of St. Paul, in the state of Minnesota. That the said Ferdinand Renner and Paul Gross, hereinbefore named, were to pay the freight from the city of St. Paul, in the state of Minnesota, and were to make remittance of the purchase price of said goods to said Lewis L. Metzger & Co., at the city of St. Paul, in the state of Minnesota, within sixty days after receipt of said liquor in said county of Potter. That this defendant has never paid any license to the county of Potter or state of South Dakota, or to the treasurer, or to anyone, as required by section 2834 of the Revised Political Code of the year 1903 of the state of South Dakota, and that the said defendant had not then and there, and has never, paid any license or fee whatsoever to any township, precinct, town or city within said county or state, and that said liquor therein sold was intoxicating liquor, towit: Whisk-y, and was not a proprietary patent medicine, and that the said defendant is not now and never has been a licensed pharmacist under the laws of the state of South Dakota."

Article 6, chapter 27, of the Revised Political Code, relating to intoxicating liquors, contains the following provisions: "In all townships, precincts, towns and cities of this state there shall be annually paid the following license upon the business of selling or
229 keeping for sale by all persons whose business in whole or in part consists in selling or keeping for sale in this state distilled, brewed or malt liquors, or mixed liquors as follows: * * * Upon the business of selling or offering for sale any of the above mentioned liquors at retail by any traveling salesman who solicits orders by the jug or bottle in lots of less than five gallons, two hundred dollars per annum. Said license to be paid in each county in which said traveling salesman does business in accordance with the provisions of section 2836. * * * All persons engaged in the selling or keeping for sale of any of the liquors mentioned in this article, whether as owner or as clerk, agent, servant or employe, shall be equally liable as principals for any violation of the provisions of this article." Rev. Pol. Codes, Sec. 2834, 2852.

Defendant contends: (1) That he did not violate the law. (2) That if he did it conflicts with the interstate commerce clause of the federal constitution and is invalid.

"The Supreme court of the United States is the one ultimate judicial authority on all questions of interstate commerce. But as has been often pointed out, and even admitted by the court itself, the decisions of that high tribunal have been far from uniform, and any attempt to reconcile all that has been said and decided by it must end in confusion. The difficulty, if not impossibility, of reconciling all the decisions upon the subject is shown by the extraordinary number of dissenting opinions in the cases. Most of the important decisions were rendered by a divided court. Still it can safely be said that the differences of opinion thus manifested have not been so much upon fundamental principles as upon the applica-
tion of those principles to particular facts and the construc-
230 tion of the various state statutes which have been under consideration. The principles themselves are fairly well settled

In view of these facts the supreme court has said that it would be a useless task to undertake to fix an arbitrary rule by which the line separating the powers of the state from the exclusive power of congress in this regard must in all cases be located, and that it is better to settle each case as it arises upon a view of the particular rights involved." 17 Am. & Eng. Ency. Law, 41. It is, therefore, especially important to have the real issues presented by this appeal accurately defined. The nature of the legislation assailed is no longer open to controversy in this court. It is an exercise of the police power. It is regulation, not taxation. State *v.* Buechler, 10 S. D. 156. It does not discriminate between resident and non resident dealers. All persons whose business in whole or in part consists in selling or keeping for sale intoxicating liquors in this state are required to procure a license before engaging in such business. If the defendant violated the law it is because he was acting as the agent or employe of Metzger & Co., who were engaged within this state in the business of selling or offering for sale such liquors at retail by traveling salesman who solicited orders in lots of less than five gallons. The power of the state to impose restraints and burdens upon persons and property in conservation of the public health, good order and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the constitution of the United States and essentially exclusive. The power of congress to regulate commerce among the several states, when the subjects of that power are national in their nature is also exclusive. The failure of Con-
231 gress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states. *In re* Rahrer, 140 U. S. 545. That the regulation of the manufacture and sale of intoxicating liquors is a proper subject for the exercise of the police power is a proposition which has never for a moment been doubted. Black Intoxicating Liquors, Sec. 31. And it is now established beyond dispute that such liquors are legitimate subjects of interstate commerce. Leisy *v.* Hardin, 135 U. S. 100; Vance *v.* Vandercook, 170 U. S., 438; *In re* Rahrer, *supra.* When the Wilson act was adopted such liquors were exempted from state regulation by operation of the interstate commerce clause to the same extent as other legitimate articles of commerce. A citizen of one state, notwithstanding the laws of another, had the right to import intoxicants into the latter and there sell them in the original packages. Up to the point of time when the importation was sold or the original package broken by the importer, the state, in the absence of congressional permission "had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer." Leisy *v.* Hardin, *supra.* The Wilson act which was adopted for the purpose of allowing state laws to operate on liquor shipped from one state into another so as to prevent the sale of original packages in violation of the state laws provides that "all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, con-

sumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory, * * * and shall not be exempt there-
232 from by reason of being introduced therein in original packages or otherwise." 17 Am. & Eng. Ency. Law, 293. By that act congress "simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction." *In re* Rahrer, *supra*. "Arrival within the state," as employed in that act has been construed to mean arrival of the importation at its destination, and state regulation attaches to the subject of an interstate shipment only after such shipment has been consummated by the arrival of the goods at their destination and their delivery to the consignee. Thodes *v.* State of Iowa, 18 Sup. Ct. Rep. 664. A consignee may receive for his own use regardless of state laws. Vance *v.* Bandercook, *supra*. So it would seem that these propositions have been established: (1) An importer of liquors from another state has no right to sell them in the original package or otherwise, except on the terms prescribed by the legislature of the state where the sales are made. (2) When intoxicating liquors are shipped from one state into another they do not become subject to any state police regulation on crossing the boundaries of the state into which they are shipped, but retain their character as an article of interstate commerce until delivered into the hands of the consignee; but upon such delivery they become subject to such regulations. (3) The receiver in one state of intoxicating liquor sent from another state has the constitutional right to receive it for his own use without regard to any state law to the contrary; but when received he can dispose of it in the original package or otherwise only on the terms prescribed by the state statutes. Beyond question all legitimate subjects of interstate commerce, other than
233 intoxicating liquors, may be imported and sold by the importer in the original package, and no feature of the transaction, from its inception to its consummation, is subject to a state regulation such as we are considering. "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." Robbins *v.* Taxing Dist. 120 U. S. 489. Hence, a state statute which requires that "each peddler or solicitor taking orders for groceries, clothing, hardware, or other mercantile establishments shall pay a license of not less than $75 nor more than $125 per year," in each county in which such soliciting is done, is clearly unconstitutional when applied to the case of a traveling salesman employed by a Minnesota tailor in soliciting orders for men's clothing to be manufactured in that state and shipped to individual purchasers in this. State *v.* Rankin, 11 S. D. 144. But that case and the one at bar are easily distinguishable. In that case the court was dealing with a commodity which the importer had a right to import and sell in the condition in which it was imported, notwithstanding the

state law. In this it is dealing with a commodity which the importer has a right to import notwithstanding the state law, but which he cannot sell within this state in the original package or otherwise, without conforming to the requirements of the state statute. In that case the law, by its terms, required a license for the mere soliciting of orders. In this it only requires a license of those who engage in the business of selling or offering for sale within the state. As heretofore suggested, this law, when properly construed, does not by its terms impose any restrictions upon the traffic beyond its
234 territorial boundaries or before the intoxicants have by permission of congress become subject to the police power of the state. If the St. Paul dealers were not engaged in the business of selling and offering for sale within this state they did not violate the law and cannot be heard to question its validity. If they were engaged in that business they cannot escape its consequences, because such business was state and not interstate commerce, the selling or offering for sale of intoxicants in the original package or otherwise within this state being subject to state regulation. Any enactment, the operation of which has a tendency to diminish the consumption of intoxicating liquors, may, in a sense, be said to indirectly interfere with interstate commerce in that commodity, but all such enactments are not for that reason invalid. The provision of the law here involved does not retard the consumption of intoxicants within this state and thus indirectly affect interstate commerce to any greater extent than do the provisions which require persons engaged in the business at designated places to procure permits to maintain such places. Regulation of the retail traffic when conducted by a traveling salesman is certainly not less necessary or desirable than when it is carried on by saloon keepers who are constantly subject to the observation of the general public and the inspection of city and town officers. If the latter method of making sales is to be regulated the former should be to the full extent of the state's police power. It is an universally accepted rule, frequently recognized by this court, that no legislative act should be declared unconstitutional unless the conflict between its provisions and some principle of constitutional law is so plain and palpable as to leave no reasonable doubt of its invalidity. Such a conflict certainly has not been
235 shown in the case. On the contrary the reasons for concluding that the statute, correctly construed, does not contravene the interstate commerce clause of the federal constitution are clear and convincing.

Does it appear that the defendant violated the law? The legislature did not intend to regulate the business of selling or offering for sale of intoxicating liquors in other states. A license is required only where the business is done in this state. Does it appear from the conceded facts that Metzger & Co., were engaged in the business of selling or offering to sell intoxicating liquors in this state without having procured the required license? and was the defendant acting as their employé in conducting such business. They were engaged in the business of selling and offering to sell intoxicants without a license and defendant was their employé. So much is certain. Was

the business conducted in this state or in Minnesota? Were they selling or offering to sell here or there? If here defendant violated the law. If there, he was not guilty of the crime charged. "Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property." Rev. Civ. Code, Sec. 1299. The defendant was not authorized to make sales here or elsewhere. The orders or offers obtained by him were subject to the approval of Metzger & Co. No contract was made, the minds of the parties did not meet, until the offers were received and accepted at St. Paul. It was expressly agreed that the goods should be delivered at that place. Title to the property was there transferred. Under these circumstances it seems clear that the sales took place in Minnesota and not in this state. Shuenfeldt *v.* Junkermann, 20 Fed. 357; Williams *v.* Feiniman, 14 Kan. 288; Frank *v.* Hoey, 128 Mass. 263; Kling *v.* Fries, 33 Mich. 275. If, as has been shown, persons residing in this state may purchase intoxicants in an-
236 other and receive them in this for their own use, regardless of the laws of this state, they certainly have the right to order intoxicants by mail or through the soliciting agent of a nonresident dealer. In this case the nonresident dealers appear to have merely solicited persons to purchase goods at their place of business in another state, something the legislature did not attempt to regulate, unless it be assumed that the lawmaking power intended to enact an unconstitutional statute, and of course such an assumption cannot be tolerated. So, I conclude that the law under which the defendant was convicted is valid, but that it does not appear that he violated such law. For this reason alone, I think the judgment of the circuit court should be reversed and a new trial ordered.

237 CORONS, *P. J.:*

I fully concur in the views expressed by Mr. Justice Haney as to the constitutionality of the license law of this state, but I am unable to concur in his conclusion that the defendant is not guilty of the offense charged, and that the judgment of the trial court therefore should be reversed. In my judgment when the conclusion was reached that the law is constitutional, it logically followed that the judgment of the court below was correct and should be affirmed, as the defendant was clearly doing business in violation of the law of this state without having first paid the license required by the law.

Section 2834, Rev. Pol. Code relating to the sale of intoxicating liquors provides: "In all townships, precincts towns and cities of the state, there shall be annually paid the following license * * * upon the business of selling or of-ering for sale any spirituous,vinous, malt, brewed or fermented or other intoxicating liquors at retail, * * * $400. per annum; upon the business of selling or offering for sale any of the above mentioned liquors at retail by any traveling salesman who solicits orders by the jug or bottle in lots of less than five gallons, $200. per annum." Section 2836 provides: "Every person engaged or intending to engage in any business mentioned in section 2834, and requiring the payment of any license mentioned

n such section, shall * * * pay to the county treasurer in ad-
ance the licenses required by section 2834 for such business for a
ear commencing on the 1st day of July and ending on the thirtieth
lay of June next thereafter." Section 2838 provides: "If any per-
on or persons shall engage or be engaged in any business requiring
he payment of license under section 2834, without having paid in
ull the license required by this article, * * * shall be pun-
ished by a fine of not less than $50.00 nor more than $500.
238 and costs of prosecution, or by imprisonment in the county
jail not less than ten days nor more than 30 days, or by both
uch fine and imprisonment in the discretion of the court."

It will be observed by the statement of facts in this case that the defendant was a traveling salesman employed by Lewis L. Metzger & Co. and that on the 10th day of February, 1904, he was engaged as such traveling salesman in soliciting orders for said company for the sale of intoxicating liquors in quantities less than five gallons from citizens and residents of and within the county of Potter and that he had not paid any license nor procured any permit to sell the same as required by the provisions of section 2834. The question is asked by Mr. Justice Haney in his opinion: "Does it appear that the defendant violated the law?" In my judgment that question can be answered in the affirmative. It appears from the statement of facts that the defendant was doing precisely what he was prohibited from doing without paying a license and obtaining a permit therefor. Great stress is placed upon the fact that the firm for which the defendant was soliciting orders was required to pass upon the orders and, if accepted the intoxicating liquors were delivered to a transportation company in St. Paul and that that constituted a delivery to the parties who had given the orders, outside of this state, and that for this reason the defendant had not violated any of the provisions of the law of this state. This construction of the law, it seems to me is entirely unwarranted by the language of its provisions, the evident intention of the law making power, and in conflict with decisions of the courts passing upon similar questions. When as it appears by the statement of facts the defendant was engaged in the business of offering for sale and soliciting orders
239 for intoxicating liquors without the payment of the license fee and obtaining a permit to engage in such business he was engaged in a business prohibited by the law making power. In the view I take of the case it is immaterial as to whether the transaction is to be regarded as a sale of liquor, or offering it for sale, or soliciting orders for the purchase of the same, as the doing of either act constitutes a violation of the provisions of the statute. Soliciting orders for the purchase of liquor constituted a part of the transaction in the sale of the same, and this was the view taken by the Circuit Court of the United States for the District of New Hampshire in Lang *et al. v.* Lynch, reported in 4 L. R. A. 831, in which that court held: "Orders taken for the sale and delivery of liquors in violation of the law of the state are a part of the contract of sale and as such render the entire transaction void, and no recovery thereon can be had." The learned circuit Judge in his opinion says: "I am of opinion,

therefore, that the taking of the order by the agent of the plaintiffs was a part of the contract of sale so far as to forbid a right of recovery upon the contract, and that the statute of New Hampshire inflicting a penalty for the offense prohibits the right of recovery for the price of liquors sold." It s true this was an action to recover the value of the liquors sold and delivered in another state but the court seems to take the view and I think very properly that taking an order by the agent was a part of the contract of sale. In this case it is not necessary to go so far as that court went, as our statute provides a penalty for offering for sale or for soliciting orders for the purchase of liquors.

240 The case of State *v.* Ascher, 54 Conn. 299, is directly in point as to the offering for sale or soliciting orders. In that case that learned court held that the act of the State of Connecticut of 1882 forbids all persons without a license therefor, to sell intoxicating liquors by sample or by soliciting or procuring orders and held that a contract for sale made in the state of Connecticut by a traveling agent of a firm in another state, of liquors to be delivered in such other state, is a violation of the statute. It appears in the statement of facts in that case as in this that a traveling salesman representing a firm of the city of New York was engaged in the state of Connecticut in soliciting orders for intoxicating liquors for his firm; that such orders were transmitted to the firm in New York city and if approved by the firm the liquors ordered were delivered to a carrier in New York City for the party ordering the same. The court in the case in its opinion says: "The defendant was convicted and appealed to this court. His grievance is that he was convicted of an unlawful sale, while, as he contends, he effected no sale within the meaning of the statute in this state. He says that he only solicited and obtained an order in this state, and that the sale was completed by a delivery of the liquors by his employers to the purchaser in the state of New York. The statute of 1882, part 6, section 1, (Acts of 1882, p. 185) provides that 'any person, who, without a license therefor, shall, by sample, by soliciting or procuring orders, or otherwise, sell any spiritous and intoxicating liquors, shall be fined for the first offense not more than fifty dollars, &c.' * * * The question is, what did the legislature mean by selling by sample, or by soliciting or procuring orders? A majority of the court think that it intended to prohibit just such a sale as was made in this case. If the statute is to be so construed as to limit its operation to sales completed by delivery in this state, of course a vast majority

241 of sales by soliciting orders will not be embraced in the statute. We think, that the legislature, taking notice of the fact that wholesale dealers in New York and elsewhere out of the state generally sell their wares through agents going from place to place soliciting and procuring orders, intended to prohibit such sales. Otherwise the facilities for making such sales are so great, extending to every town and hamlet in the state, that the efficiency of the license law would be materially impaired. Dealers in neighboring states, without license and without restriction could sell and cause to be delivered in any and all parts of the state, liquors to any

extent. Hence the legislature was careful to guard against such a result by prohibiting, as it does in the eleventh section, all sales without a license and all sales in a no-license town." And the court in concluding its opinion says: "The claim that the legislature intended only such sales as should be consummated by a delivery in this state cannot be allowed. It is a matter of common knowledge that sales effected by drummers are usually, if not always, consummated by a delivery at the vendor's place of business to a common carrier; and while such delivery for all civil purposes completes the sale made by the drummer, vests the title in the purchaser, and gives the seller a right to the purchase money, yet for all police purposes it is competent for the legislature to say that the acts done by the drummers shall of themselves constitute a sale and therefore an offense. And we think the legislature intended so to say, and to make all such acts an offense, whether the delivery was in or out of the state. By doing so the word 'sell' is used in the same sense in which it is generally used by business men in relation to this subject matter. In common language a drummer sells goods; he sells by sample; he sells by soliciting and procuring orders; the
242 dealers sell by drummers as their agents. Now if the statute does not reach all such cases then it falls short of reaching the evil aimed at, and the intended remedy is a failure."

That court in its opinion evidently disregarded the claim made by the defendant that the orders taken by him were required to be passed upon and accepted by the firm in New York city before a sale could be made, and the claim that the interstate commerce law was violated, as unworthy of notice as it does not refer to them in the majority opinion. It will be observed that the provisions of the statute in this state are broader and more comprehensive than the provisions of the statute of Connecticut and that they include not only the sale of intoxicating liquors but the offering for sale and soliciting of orders.

Mr. Justice Haney places reliance upon the case of Distilling Co. *v.* Nutt, 34 Kan. 724, 10 Pac. 163, but that was a civil action for the recovery of the value of a barrel of whisky delivered at Kansas City, in Missouri. In the later case of Westheimer *v.* Weisman, 60 Kan. 753, which was also an action to recover the value of certain liquor sold, the court in its opinion says: "The penalty of section 32 above quoted is inflicted upon the very person who takes or receives an order from any person in this state not authorized to sell liquor, and hence the agent receiving an order for whisky here would be amenable to the penalties of the law." And again in the same opinion the court says: "The agent made no sale and could only be liable under the statute for the taking of an order for intoxicating liquor. The statute operating only on the agent cannot prejudice the rights of Westheimer & Sons, who made the sale in another state. The agent did no more than make an offer of sale subject to the approval of his house. The final acceptance of the order and con-
243 summation of the sale occurred in Missouri, where such sales were lawful. Being lawful there, a recovery of the price of the whisky can be had in our courts." It will thus be seen that that

court recognizes the fact that while the sale of liquor may have been consummated in another state the agent who procured the order was nevertheless liable to the penalty imposed for a violation of the statute. Clearly the defendant in the case at bar was engaged in the business, in Potter county, not only of selling but offering for sale and soliciting orders for the sale of intoxicating liquors. The claim that the defendant had not committed the offense under the statute because the order had to be approved in St. Paul, and that the delivery was made there to the purchaser and not in South Dakota is clearly untenable. Such a construction is entirely unwarranted by the law itself or by the evident intention of the law making power. In my judgment it is entirely immaterial whether the liquors were delivered in this state or delivered at all; the offense was complete under the statute when the defendant solicited the order or offered the liquors for sale.

It seems to me that the construction given to our statute is altogether too narrow and technical and one entirely unwarranted either by the language of the statute or by the clear intention of the legislature in passing the act, and that the interstate commerce law is not in any manner involved in this case. The lawmaking power in adopting the license system for this state sought as far as possible to minimize the evils of intemperance and prevent the miseries resulting from the use of intoxicating liquors by requiring all parties engaged in the business, before so doing, to pay a license and obtain a permit therefor, and this policy is clearly carried out in the provisions of the statute. The legislature not only prohibited
244 the sale of intoxicating liquors but the offering for sale or the soliciting of orders for the purchase of the same by any person, unless he had paid such license and procured the permit. We may assume that the legislature knew all or nearly all traveling salesmen take orders subject to the approval of the houses represented by them and that the delivery of the goods sold is usually made in other states. If our legislature simply meant to prohibit the offering for sale or soliciting of orders in cases where the goods were actually delivered by the agent in this state, it failed to accomplish anything beneficial by the enactment of the law, as of course it was known to them as it is known to us that few if any such sales would be made by agents in this state, but there would be, as in the case at bar the form of submitting the order to the firm outside of the state and that such firm would accept the order and deliver the liquors outside of our state. I understand that the power of the legislature to require the payment of such license before engaging in the business in this state of soliciting orders or offering for sale intoxicating liquors will be affirmed by the undivided court in holding the law constitutional.

In my opinion the judgment of the court below should be affirmed.

245 FULLER, *J.*:

As self-preservation is a law of nature predominant in every organized community, the inherent right to guard against the introduction and traffic in commodities which endanger the health and

corrupt the morals of our citizens was never surrendered to the general government and the statute confessedly violated by the accused in no manner interferes with any of the laws of the United States.

From the opinion of Chief Justice Tanney in the License Cases, 5 Howard, 504, I quote as follows: "These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

Assuming that our police system of regulating the liquor traffic by means of high license has a tendency to diminish inter-
246 state shipments, that result would constitute no infringement of the Constitutional guaranty of commercial freedom among the states. Independently of any question of citizenship and without the slightest discrimination, the solicitor of orders, as a person engaged in the business of offering intoxicating liquors for sale, must pay the license or suffer the penalty provided by statute, but no penalty, restriction, or burden is imposed upon a nonresident engaged in interstate commerce.

As to the validity of the law under consideration, I concur with both my associates and, with Presiding Judge Corson, agree in the conclusion that plaintiff in error was lawfully convicted. Consequently, the determination of all questions of law and fact at the trial below are sustained by the majority of this court and the judgment of conviction is therefore affirmed.

247 STATE OF SOUTH DAKOTA, *In Supreme Court, ss:*

STATE OF SOUTH DAKOTA, Plaintiff and Defendant in Error,

vs.

JAY DELAMATER, Defendant and Plaintiff in Error.

I, Frank Crane, Clerk of the Supreme Court in and for the State of South Dakota, do hereby certify that the foregoing pages numbered from one to 21 inclusive, contain a true and correct copy of the opinion in the above entitled cause, and of the whole thereof, as the same now remains of record in said Supreme Court.

In witness whereof I have hereunto set my hand and affixed the Seal of said Court, at Pierre, this 6th day of November A. D. 1905.

[Seal Supreme Court, State of South Dakota.]

FRANK CRANE,
Clerk of the Supreme Court,
By —— ——, *Deputy.*

248 And afterwards, to-wit, on the 21st day of September A. D. 1905 a petition for a writ of error was filed and allowance made in this court, which in words and figures are as follows:

249 Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DELAMATER, Plaintiff in Error.

Upon presentation and consideration of the petition of the plaintiff in error herein, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States, the questions presented by the record in said matter,

It is hereby ordered, that a writ of error be and is hereby allowed to this Court from the Supreme Court of the United States. It is further ordered that security in this matter be fixed in the sum of One Thousand ($1000) Dollars, and that upon filing approved security in that amount, with the writ of error herein, all proceedings herein be stayed pending the final determination of said matter by the Supreme Court of the United States.

Dated this 18th day of September, 1905.

DIGHTON CORSON,
Presiding Justice, Supreme Court of the State of South Dakota.

250 STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DELAMATER, Plaintiff in Error.

To the Honorable Dighton Corson, presiding judge of the Supreme Court of the State of South Dakata:

Now comes, Jay Delamater, the above named plaintiff in error by his attorneys, M. H. Boutelle and Jonas Weil, and complains and alleges that he is a citizen of the United States of America; that in the above entitled matter, on the 22nd day of August, 1905, final judgment was rendered against your petitioner by the Supreme Court of the State of South Dakota, that being the highest court of law or equity in the said State of South Dakota, wherein, it was adjudged that the provisions of Article 6, Chapter 27, of the Revised Political Code of the State of South Dakota and more particularly, Sections 2834 and 2852 of said Revised Political Code of said State, which made it unlawful for any traveling salesman to solicit orders within said State of South Dakota for distilled, brewed or malt liquors or mixed liquors in lots of less than five gallons, without first obtaining the license thereby provided, and further made the solicitation of orders for such liquors without obtaining such license, a criminal offense, punishable in accordance with the provisions of that

Act, are not in conflict with the provisions of Section 1, of the Fourteenth Amendment to the Federal Constitution, in that the provisions of said Act did not deprive certain citizens of the United States of the right, privilege or immunity secured to other citizens of the United States, nor of the equal protection of the law,
251 and wherein, it was also adjudged by said Supreme Court by its said final judgment in the above entitled matter, that the provisions of said Act of the State of South Dakata are not in violation of the provisions of Section 8, of Article I, of the Federal Constitution, giving to Congress the exclusive right to regulate commerce among the several States, all of which appears in the record, opinion and final judgment of said Supreme Court, affirming the judgment of conviction theretofore rendered in the Circuit Court of said State, whereby manifest error has happened to the great damage of your petitioner.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of South Dakota and the Judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States and the error complained of by your petitioner may be examined and corrected and said judgment reversed, and your petitioner will ever pray.

JAY DELAMATER,

By —— ——,

His Attorneys.

252 Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, Defendant in Error,

vs.

JAY DELAMATER, Plaintiff in Error.

Now comes, the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of South Dakota in the above entitled matter, there is manifest error in this, to-wit:

First: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of citizens of other States of the United States than the State of South Dakota, and having no residence or place of business in said State of South Dakota, are not in conflict with and in violation of, Section 8, of Article I, of the Constitution of the United States, which confers on Congress the exclusive power to regulate commerce among the several States.

Second: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of

citizens of other States of the United States than the State of
253 South Dakota, and having no residence or place of business in said State of South Dakota, do not constitute regulations and restrictions on commerce between the several States.

Third: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of citizens of other States of the United States than the State of South Dakota, and having no residence or place of business in said State of South Dakota, do not constitute a tax upon commerce between the several States.

Fourth: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of citizens of other States of the United States than the State of South Dakota, and having no residence or place of business in said State of South Dakota, was within the police powers of the Legislature of the State of South Dakota.

Fifth: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of citizens of other States of the United States than the State of South Dakota, and having no residence or place of business in said State of South Dakota, making it unlawful for the plaintiff in error to carry on his business as a traveling salesman of and for a citizen or citizens of other States than the State of South Dakota and having and maintaining no office or place of business within said State of
South Dakota, without taking out a license from said State
254 and paying the license fee provided by said laws, was within the police powers of the Legislature of the State of South Dakota.

Sixth: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of citizens of other States of the United States than the State of South Dakota, and having no residence or place of business in said State of South Dakota, was not in conflict with and in violation of, the provisions of the Fourteenth Amendment of the Constitution of the United States, for that the State of South Dakota by and through the provisions of said laws, assumes and seeks (1) to deprive the plaintiff in error and certain other citizens of the United States and of the State of South Dakota, of rights, privileges and immunities secured to other citizens of the United States and of the said State,

and (2) to deprive and to deny to the plaintiff in error and certain citizens and persons within the jurisdiction of the State of South Dakota, the equal protection of the law.

Seventh: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of citizens of other States of the United States than the State of South Dakota, and having no residence or place of business in said State of South Dakota, are not in conflict with and in violation of, the provisions of Section 2, of Article 4, of the Constitution of the United States.

Eighth: The Court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the State of South Dakota, in so far as said laws refer or
255 purport to refer, to traveling salesmen engaged in said State in soliciting orders for the sale of liquors to citizens of said State on behalf of citizens of other States of the United States than the State of South Dakota, and having no residence or place of business in said State of South Dakota, do not discriminate between citizens of South Dakota and citizens of other States.

Ninth: The Court erred in affirming the judgment of conviction.

Tenth: The Court erred in failing to render judgment that the laws on which plaintiff in error was convicted, were illegal as contrary to the Constitution of the United States, and that the judgment of conviction should be reversed.

——— ———,
——— ———,
Attorneys for Plaintiff in Error.

256 Filed in my office this 21st day of September, 1905.

FRANK CRANE,
Clerk of the Supreme Court of the State of South Dakota.

257 [Endorsed:] 2083. Supreme Court of the State of South Dakota. State of South Dakota, Defendant in error — Jay Delamater, Plaintiff in error Petition and allowance of writ of error and assignment of error. M. H. Bartelly and Jonas Weil, Att'y for P'tf in error Supreme Court, State of South Dakota Filed Sep. 21 1905 Frank Crane, Clerk.

258 And afterwards, to-wit: on the same day there was filed in this court a writ of error from the United States Supreme Court which said original writ appears on the next page:

259 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of South Dakota, Greeting

Because in the record and proceedings as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of South Dakota before you, or some of you, by the highest court of law or equity of said State in which a decision could be had in the said suit between State of South Dakota, defendant in error and Jay Delamater, plaintiff in error, wherein was drawn in question the validity of a Treaty or Statute of or an authority exercised under the United States and the decision was against their validity or wherein was drawn in question the validity of a Statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, Treaties or Laws of the United States and the decision was in favor of such, their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a Treaty, or Statute of or Commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, Treaty or Commission, a manifest error hath happened to the great damage of the said Jay Delamater, as by his complaint appears, we being willing that error, if any hath been, should be corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 10th day of November 1905, in the said Supreme Court, to be then and there held that, the record and proceedings aforesaid being inspected, the said Su-

260 preme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 19th day of September, in the year of our Lord, Nineteen Hundred and Five.

[Seal Circuit Court of the United States, District of South Dakota. Sioux Falls.]

OLIVER J. PENDAR,
Clerk United States Circuit Court, in and for the District of South Dakota.

261 [Endorsed:] 2083 Supreme Court of the State of South Dakota. State of South Dakota, Defendant in Error, *vs.* Jay Delamater, Plaintiff in Error. Writ of Error. Original received and copy lodged in this office this 21 day of September, 1905 Frank Crane Clerk Supreme Court, State of South Dakota. M. H. Boutelle and Jonas Weil Att'ys for P'l'f in Error Supreme Court State of South Dakota. Filed Sep. 21 1905 Frank Crane Clerk

262 That afterwards, to-wit, on the same day there was filed in this court a citation on Writ of Error which in words and figures is as follows, to-wit:

263 Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DELAMATER, Plaintiff in Error.

UNITED STATES OF AMERICA, *ss:*

To the State of South Dakota, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of South Dakota, wherein, Jay Delamater is plaintiff in error and you, the State of South Dakota, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Dighton Corson, presiding Justice of the Supreme Court of the State of South Dakota, this 21st day of September, in the Year of our Lord, One Thousand Nine Hundred and Five.

DIGHTON CORSON,
Presiding Justice of the Supreme Court of the State of South Dakota.

264 Copy of the within citation received this — day of September, 1905, at the office of the Attorney General of the State of South Dakota.

——— ———,
Attorney General.

265 [Endorsed:] 2083. Supreme Court of the State of South Dakota State of South Dakota, Defendant in Error, *vs.* Jay Delam-ter, Plaintiff in Error. Citation on Writ of Error Supreme Court State of South Dakota Filed Sep. 21 1905 Frank Crane, Clerk. M. H. Boutelly, and Jonas Weil, att'ys for P't'f In Error.

266 That afterwards, to-wit, on the same day there was filed in this court an Undertaking on Writ of Error which original undertaking appears on the next page.

267 Supreme Court of the State of South Dakota.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DELAMATER, Plaintiff in Error.

Undertaking on Writ of Error.

Know all men by these presents, that the United States Fidelity and Guaranty Company of Baltimore, a corporation organized under the laws of the State of Maryland, has and hereby does undertake, promise and agree to pay unto the State of South Dakota, its successors or assigns, the sum of One Thousand ($1000) Dollars.

The condition of this undertaking is such that whereas, the above named Jay Delamater, plaintiff in error in the above entitled action in which judgment has heretofore been rendered in the Supreme Court of the State of South Dakota, has prosecuted a writ of error in the Supreme Court of the United States to review and reverse the said judgment of the Supreme Court of the State of South Dakota.

Now therefore, the condition of this undertaking is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this undertaking shall be void, otherwise, to remain in full force and effect.

[Seal The United States Fidelity & Guaranty Company. Incorporated 1896.]

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By DOUGLAS W. MARCH.
H. R. HORNER.

268 STATE OF SOUTH DAKOTA, — *County:*

On this — day of September, A. D., 1905, personally appeared before me —— ——, who being duly sworn, deposes and says that he is a member of the local Board of Directors of the United States Fidelity and Guaranty Company of Baltimore; that the seal affixed to the foregoing instrument is the corporate seal of said corporation and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors and the said —— —— acknowledged said instrument to be the free act and deed of said corporation.

—— ——,
Notary Public, — County, South Dakota.

The within undertaking is hereby approved, this 23rd day of September, 1905.

DIGHTON CORSON,
Presiding Justice of the Supreme Court of the State of South Dakota.

9 [Endorsed:] 2083. Supreme Court of the State of South Dakota. State of South Dakota, Defendant in Error, *vs.* y Delamater, Plaintiff in Error. Undertaking on Writ of Error. upreme Court, State of South Dakota. Filed Sep. 21 1905 Frank rane, Clerk. M. H. Bautelle & Jonas Weil, Att'y for P'l'f in Error.

70 In the Supreme Court, State of South Dakota.

STATE OF SOUTH DAKOTA, Defendant in Error,
vs.
JAY DELAMATER, Plaintiff in Error.

I, Frank Crane, Clerk of the Supreme Court of the State of South Dakota, certify that the within and foregoing is a correct and complete transcript of the record and proceedings of the above entitled cause as the same now appears of record and on file in this court.

[Seal Supreme Court, State of South Dakota.]

FRANK CRANE,
Clerk of the Supreme Court, State of South Dakota.

271 Supreme Court of the United States, October Term 1906.

No. 149.

JAY DELAMETER, Plaintiff in Error,
v.
STATE OF SOUTH DAKOTA, Defendant in Error.

It is agreed by and between Counsel for Plaintiff in Error and Counsel for Defendant in Error, that there may be omitted from the printed record to be used in the above styled cause in the Supreme Court of the United States all briefs that were used in the lower courts, and all briefs which are incorporated in the record as filed in this Court, and that neither party to this agreement shall be prejudiced in any manner by the omission of such briefs as part of the printed record.

HERBERT JACKSON,
Counsel for Plaintiff in Error.
S. M. HOWARD,
Counsel for Defendant in Error.

272 [Endorsed:] File No. 19963. Supreme Court U. S. October Term, 1906. Term No. 149. Jay Delamater, P'l'ff in Error, *vs.* The State of South Dakota. Stipulation to omit parts of record in printing Filed June 30, 1906.

Endorsed on cover: File No. 19,963. South Dakota supreme court. Term No. 149. Jay Delamater, plaintiff in error, *vs.* The State of South Dakota. Filed November 13th, 1905. File No. 19,963.

FILE COPY.

FILED.
NOV 30 1906
JAMES H. McKENN

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 149.

JAY DELAMETER, *Plaintiff in Error*,

vs.

THE STATE OF SOUTH DAKOTA,

In error to the Supreme Court of the State of South Dakota.

Brief for Plaintiff in Error.

HERBERT JACKSON,
Attorney.

AUTHORITIES CITED.

Statement of the Case.

SECTIONS 2834, 2836, 2838, 2852, of the Revised Political Code of South Dakota.
SESSION LAWS, South Dakota, 1901, 238, &c.

Was the Statute a Restriction or Regulation of Interstate Commerce?

Liquor is a Legitimate Subject of Interstate Commerce.

Leisy v. Hardin, 135 U. S., 100, 110.
In re Rahrer, 140 U. S., 545.
Rhodes v. Iowa, 170 U. S., 412, 414;
Bowman v. Railway Co., 125 U. S., 465.

The Statute Complained of is a Direct Interference with Interstate Commerce.

Bowman vs. Chicago & Northwestern Ry. Co., 125 U. S., 465, 524.
Robbins v. Taxing District of Shelby County, 120 U. S., 489-502.

Corson v. State of Maryland, [illegible] U. S., 502, 506.
Brennan v. City of Titusville, [illegible] U. S., 289, 308.
Caldwell v. North Carolina, 187 U. S., 622, 624.
Norfolk & Western Ry. Co. v. Sims, 191 U. S., 441, 451.
Rhodes v. State of Iowa, 170 U. S., 412-438.
Vance v. Vandercook Co., 170 U. S., 438, 468.
American Express Co. v. State of Iowa, 196 U. S., 133, 146.

Was the Regulation Imposed by Section 2834 of the Revised Political Code of South Dakota a Tax on Interstate Commerce?

Robbins v. Taxing District of Shelby County, 120 U. S., 489, 502.
Session Laws, South Dakota, 1901, p. 246.
Caldwell v. North Carolina, 187 U. S., 622, 633.
American Express Co. v. Iowa, 196 U. S., 133, 146.

Was Section 2834 of the Revised Political Code of South Dakota a Police Regulation?

Austin v. Tennessee, 179 U. S., 343, 388.
American Express Co. v. Iowa, 196 U. S., pp. 133-146.
Cook v. Marshall County, 196 U. S., 261, 275.
Schollenberger v. Penn. 171 U. S. pp. 1-30.

Supreme Court of the United States.

OCTOBER TERM, 1906,

No. 149.

JAY DELAMETER,
Plaintiff in Error,

Vs.

THE STATE OF
SOUTH DAKOTA.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

By an Act of the Legislature of the State of South Dakota, known as Section 2834, of the Rev. Pol. Code, it is provided:

> "In all townships, precincts, towns and cities of the State, there shall be annually paid the following license . . . upon the business of selling or offering for sale any spirituous, vinous, malt, brewed or other intoxicating liquor at retail . . . $400.00 per annum; upon the business of selling or offering for sale any of the above-mentioned liquors at retail

by any traveling salesman who solicits orders by the jug or bottle in lots of less than five gallons $200.00 per annum." (See page 1 of the Record.)

By Section 2836, of the Rev. Pol. Code, it is further provided:

"Every person engaged or intending to engage in any business mentioned in Section 2834, and requiring payment of any license mentioned in such section shall . . . pay to the County Treasurer, in advance, the license required by Section 2834 for such business for a year, commencing on the 1st day of July and ending on the thirtieth day of June next thereafter." (See pages 36 and 37 of the Record.)

And by Section 2838, Rev. Pol. Code, it is further provided:

"If any person or persons shall engage or be engaged in any business requiring the payment of license under Section 2834 without having paid in full the license required by this Article . . . shall be punished by a fine of not less than $50.00 nor more than $500.00, and costs of prosecution, or by imprisonment in the county jail not less than ten days nor more than thirty days, or by both such fine and imprisonment in the discretion of the court." (See page 37 of the Record.)

And by Section 2852 of the Rev. Pol. Code, it is further provided:

"All persons engaged in the selling, or keeping for sale, of any of the liquors mentioned in this article, whether as owner or as clerk, agent, servant or employe, shall be equally liable as principals, for any violation of the provisions of this Article."

On the 29th day of March, 1904, in the Circuit Court of the Sixth District of the State of South Dakota, an information was filed by Samuel M. Howard, State's Attorney for the county of Potter, charging the plaintiff in error, Jay Delameter, with vio-

lating the provisions of Section 2834, of the Revised Political Code of the year 1903 of the state of South Dakota, in that said Delameter, whose business consisted, in whole or in part, of unlawfully selling, or offering for sale, spirituous, vinous, malt, brewed, fermented or other intoxicating liquors, as a traveling salesman, did on the 10th day of February, 1904, in the county of Potter, state of South Dakota, then and there unlawfully solicit orders for such intoxicating liquors by the jug, bottle or other vessel, in lots of less quantity than five gallons of each at one time, and without first having paid the license to said county of Potter, or to the treasurer thereof, as required by Section 2834, of the Revised Political Code, and that said Delameter had not paid any license to any township, precinct, town or city, etc. (See page 11 of the Record.)

Thereafter, the defendant appeared, waived examination, and demurred to the information on the ground "that the facts stated in said information did not constitute a public offense," which demurrer, after argument, the Circuit Court overruled. (See page 13, of the Record.)

The defendant entered a plea of "not guilty " and the action proceeded to trial.

The only witness introduced was the plaintiff in error, Jay Delameter, who testified as follows:

> "That the defendant, Jay Delameter, is now, and was on the 10th day of February, A. D., 1904, a traveling salesman, employed by Lewis L. Metzger & Co., and that the said Lewis L. Metzger & Co., are residents of the city of St. Paul, in the state of Minnesota, and that said Lewis L. Metzger & Co. have their place of business at the said city of St. Paul, and have no place of business in the state of South Dakota, and have had no such place of business in the said state of South Dakota. That on the 10th day of February,

A. D., 1904, Jay Delameter, as such employe, was engaged as said traveling salesman, in soliciting proposals or orders for said Lewis L. Metzger & Co., for the sale of intoxicating liquors, in quantities less than five gallons, from citizens and residents of and within the county of Potter, and state of South Dakota, who were not merchants, traders or dealers in intoxicating liquors. That on said date he solicited and requested proposals or orders from Ferdinand Renner and Paul Gross, who were not merchants, traders or dealers in intoxicating liquors, at and in the county of Potter, and the state of South Dakota, soliciting or requesting proposals or orders from said last-named persons, for the sale to them, by Lewis L. Metzger & Co., of said intoxicating liquors. That the said proposals and orders were procured for defendant from said last-named persons, forwarded to his principal, the said Lewis L. Metzger & Co., in the city of St. Paul, state of Minnesota. At said time no money was paid by either of the said persons to the said defendant or to said Lewis L. Metzger & Co., and said proposals or orders were forwarded with the understanding that they were subject to the approval of the said Lewis L. Metzger & Co., and that the defendant had no power or authority to approve said proposals or orders, nor to receive any money thereon. In addition to being subject to the approval of said Lewis L. Metzger & Co., said proposals or orders were conditioned that the said whiskey so ordered, should be delivered to the said Ferdinand Renner and Paul Gross, hereinbefore named, f. o. b. cars at the city of St. Paul, in the state of Minnesota. That the said Ferdinand Renner and Paul Gross, hereinbefore named, were to pay the freight from the city of St. Paul, in the state of Minnesota, and were to make remittance of the purchase price of said goods, to said Lewis L. Metzger & Co., at the city of St. Paul, in the state of Minnesota, within sixty days after receipt of said liquor in said county of Potter. That this defendant has never paid

any license to the county of Potter or state of South Dakota, or to the treasurer, or to any one, as required by Section 2834, of the Revised Political Code, of the year 1903, of the state of South Dakota, and that the said defendant had not then and there, and never has paid any license or fee whatsoever to any township, precinct, town or city within the said county or state, and that said liquor therein sold was intoxicating liquor, to wit: whiskey, and was not a proprietary patent medicine, and that the said defendant is not now, and never has been, a licensed pharmacist, under the laws of the state of South Dakota" (See pages 13 and 14, of the Record.)

The plaintiff in error, at the conclusion of the testimony, moved the court to advise the jury to return a verdict for defendant (plaintiff in error) for the reason that it appeared from the uncontradicted testimony that no sale was made within the state of South Dakota, and for the further reason that the statute under which the prosecution was brought was unconstitutional and void, because it conflicted with Section 8 of Article I of the Constitution of the United States, and this transaction being an interstate transaction, which motion was overruled by the court (See page 14, of the Record).

The plaintiff in error, as a result of the trial, was found guilty, as charged in the information (See page 14, of the Record), and thereupon filed a motion in arrest of judgment, urging the same grounds as previously urged on the motion requesting the court to direct a verdict, which motion was overruled (See page 15, of the Record).

Thereupon, the plaintiff in error filed a motion for a new trial, setting up the same grounds as theretofore urged on the previous motion, and also other grounds, which motion was

overruled by the court, to which order the plaintiff in error excepted. (See page 16, of the Record.)

Thereupon, the court pronounced judgment upon the plaintiff in error, and directed him to pay a fine of two hundred and fifty ($250.00) dollars, and in default of payment, sent him to the county jail of Potter county, for one hundred and twenty-five (125) days, to which sentence and judgment plaintiff in error excepted (See page 17, of the Record).

The plaintiff in error afterwards filed his assignment of errors, urging particularly the unconstitutionality of the judgment and proceedings, and asserting that they were all contrary to Section 8 of Article I of the Constitution of the United States (See pages 17 and 18, of the Record).

Such proceedings were had that the citation upon the assignment of errors duly issued and was made returnable before the Supreme Court of the state of South Dakota, at its April Term, 1904. The cause was duly argued and brought before the highest tribunal of the state of South Dakota, and on August 22, 1905, the judgment of the Circuit Court was affirmed (See page 30, of the Record).

The court will notice that the Supreme Court of the state of South Dakota was divided in its opinion. Haney, J., being of opinion that the judgment should be reversed and a new trial ordered (See pages 31 to 36, of this Record), and Corons, P. J., and Fulton, J., being of opinion that the judgment should be affirmed (See pages 36 to 41, of this Record).

Thereafter, the plaintiff in error filed its petition for a writ of error, and the same was duly allowed (See page 42, of this Record).

Said petition in error and assignment of errors appear in full on pages 42, 43, 44, and 45, of this Record.

SPECIFICATION OF ERRORS RELIED ON.

Plaintiff in error relies upon the following errors, and urges that because thereof there should be a reversal of the judgment of the Circuit Court of Potter County and the Supreme Court of South Dakota, to-wit:

"First: The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852, of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling salesmen engaged in said state in soliciting orders for the sale of liquors to citizens of said state, on behalf of citizens of other states of the United States than the state of South Dakota, and having no residence or place of business in said state of South Dakota, are not in conflict with and in violation of Section 8, of Article I, of the Constitution of the United States, which confers on Congress the exclusive power to regulate commerce among the several states.

"Second: The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852, of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling salesmen engaged in said state in soliciting orders for the sale of liquors to citizens of said state on behalf of citizens of other states of the United States than the state of South Dakota, and having no residence or place of business in said state of South Dakota, do not constitute regulations and restrictions on commerce between the several states.

"Third: The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852, of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling salesmen engaged in said state in soliciting orders for the sale of liquors to citizens of said state on behalf of citizens of

other states of the United States than the state of South Dakota, and having no residence or place of business in said state of South Dakota, do not constitute a tax upon commerce between the several states.

"Fourth: The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling salesmen engaged in said state in soliciting orders for the sale of liquors to citizens of said state on behalf of citizens of other states of the United States than the state of South Dakota, and having no residence or place of business in said state of South Dakota, was within the police power of the Legislature of the state of South Dakota.

"Fifth: The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling salesmen engaged in said state in soliciting orders for the sale of liquors to citizens of said state on behalf of citizens of other states of the United States than the state of South Dakota, and having no residence or place of business in said state of South Dakota, making it unlawful for the plaintiff in error to carry on his business as a traveling salesman of and for a citizen, or citizens, of other states than the state of South Dakota, and having and maintaining no office or place of business within said state of South Dakota, without taking out a license from said state and paying the license fee provided by said laws, was within the police powers of the Legislature of the state of South Dakota.

"Sixth: The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852, of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling sales-

men engaged in said state in soliciting orders for the sale of liquors to citizens of said state on behalf of citizens of other states of the United States than the state of South Dakota, and having no residence or place of business in said state of South Dakota, was not in conflict with, and in violation of, the provisions of the Fourteenth Amendment of the Constitution of the United States, for that the state of South Dakota, by and through the provisions of said laws, assumes and seeks (1) to deprive the plaintiff in error, and certain other citizens of the United States, and of the state of South Dakota, of rights, privileges and immunities secured to other citizens of the United States and of the said state; and (2) to deprive and deny to the plaintiff in error, and certain citizens and persons within the jurisdiction of the state of South Dakota, the equal protection of the law.

"Seventh: The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852 of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling salesmen engaged in said state in soliciting orders for the sale of liquors to citizens of said state on behalf of citizens of other states of the United States than the state of South Dakota, and having no residence or place of business in said state of South Dakota, are not in conflict with, and in violation of, the provisions of Section 2, of Article 4, of the Constitution of the United States.

"Eighth: The court erred in holding that the provisions of Article 6, Chapter 27, Sections 2834 and 2852, of the Revised Political Code of the state of South Dakota, in so far as said laws refer, or purport to refer, to traveling salesmen engaged in said state in soliciting orders for the sale of liquors to citizens of said state on behalf of citizens of other states of the United States than the State of South Dakota, and having no residence or place of business in said state of South Dakota, do not discriminate between citizens of South Dakota and citizens of other states.

"Ninth: The court erred in affirming the judgment of conviction.

"Tenth: The court erred in failing to render judgment that the laws on which plaintiff in error was convicted, were illegal, as contrary to the Constitution of the United States, and that the judgment of conviction should be reversed."

The errors shown by the record seem to raise the following

QUESTIONS:

First: Was the Act of the Legislature of South Dakota, known as Section 2834, of the Revised Political Code, a **regulation** or a **restriction** of Interstate Commerce, and because thereof, void?

Second: Was the regulation imposed by Section 2834 of the Revised Political Code of South Dakota a **tax** on Interstate Commerce?

Third: Was it within the **police power** of the state of South Dakota to pass a law such as Section 2834 of the Revised Political Code?

I will take the questions up in the order above set out.

ARGUMENT.

WAS THE ACT OF THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA A REGULATION OR RESTRICTION OF INTERSTATE COMMERCE?

The Act in question, known as Section 2834, of the Revised Political Code of South Dakota, is as follows:

> "In all townships, precincts and cities of this state there shall be annually paid, the following license upon the business of selling, or keeping for sale, by all persons whose business, in whole or in part, consists in selling, or offering for sale in this state, distilled, brewed or malt liquors, or mixed liquors, as follows: * * * *upon* the business of *selling, or offering for sale,* any of the above-mentioned liquors at retail, by any traveling salesman, who solicits orders by the jug or bottle, in lots of less than five gallons, two hundred dollars per annum. Said license to be paid in each county in which said traveling salesman does business," etc. * * *

The court will notice that the license tax is imposed upon "the business of selling, or offering for sale, any of the above-mentioned liquors."

A glance at the statute shows that if liquor be a subject of interstate commerce that the Article under which the plaintiff in error was convicted must necessarily be a regulation of interstate commerce. Therefore, we will consider (*a*) is liquor a legitimate subject of interstate commerce; and (*b*) did the Act complained of directly, or indirectly, interfere with such commerce?

Liquor is a Legitimate Subject of Interstate Commerce.

In *Leisy* v. *Hardin*, 135 U. S., 100, 110, this court said:

> "Ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which the right of traffic exists, and are so recognized by the usages of the commercial world."

In *Re Rahrer*, 140 U. S. 545, this court said:

> "Unquestionably, fermented, distilled, or other intoxicating liquors or liquids are subjects of commercial intercourse, exchange, barter and traffic, between nation and nation, and between state and state, like any other commodity in which the right of traffic exists, and are recognized by the usages of the commercial world, the laws of Congress and the decisions of courts."

And again in *Rhodes* v. *Iowa*, 170 U. S., p. 414:

> "The sole question presented for consideration is whether the statute of the state of Iowa can be held to apply to the box in question, whilst it was in transit from its point of shipment, Dallas, Illinois, to its delivery to the consignee, at the point to which it was consigned. That is to say, whether the law of the state of Iowa can be made to apply to a shipment from the state of Illinois, before the arrival and delivery of the merchandise, without causing the Iowa law to be repugnant to the Constitution of the United States."

After a thorough discussion, the court held the Iowa statutes unconstitutional.

The principle enunciated in the foregoing cases is also followed in

Bowman v. *Railway Co.*, 125 U. S., 465;

The Statute Complained of is a Direct Interference with Interstate Commerce.

It is clear, beyond doubt, that liquor is a legitimate subject of interstate commerce, and it is equally clear, that the Act of the Legislature of South Dakota interfered with such commerce.

It is well settled in the case of

Bowman v. *Chicago & Northwestern Ry. Co.*, 125 U. S., 465-524;

that the Act of the Iowa Legislature, forbidding any common carrier to bring within that state, intoxicating liquors, from any other state or territory, without first having a certificate required by the Act, is a regulation of commerce among the states, and is void, as repugnant to the Constitution of the United States.

The court, through Mr. Justice Matthews, said, *Ibid.*, 493:

> "It is conceded, as we have already shown, that for the purposes of its policy, a state has legislative control, exclusive of Congress, within its territory, of all persons, things and transactions of strictly internal concern. For the purpose of protecting its people against the evils of intemperance it has the right to prohibit the manufacture, within its limits, of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other states, or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It *can not*, without the consent of Congress, express or implied, regulate commerce between its people and those of the other states of the Union, in order to effect its end, however desirable such a regulation might be."

In the case at bar, the traveling agent was taking an order or proposal for merchandise in the state of South Dakota. The proposal was to be sent to the principal in Minnesota, and, if accepted, the goods were to be shipped f. o. b. cars, St. Paul, Minnesota. No money was to be paid to the agent, as he had no authority to receive any (See page 13, of this Record), but, on the other hand, the money was to be sent to the principal at St. Paul, Minnesota. How would it be possible to present a plainer interstate transaction? This was truly interstate commerce, as defined by Article 1, Section 8, of the Constitution. And for the state to interfere with it was a direct attempt "to regulate commerce" among the several states.

The court will notice that there was no attempt at re-sale in South Dakota, in that, in fact, no *merchandise was ever delivered* —so there was no transaction of any kind that the state could assume jurisdiction over. The entire transaction being completed in Minnesota, and it being plainly a Minnesota contract, and nothing was done in South Dakota to in any way change the rule.

In the case of

Robbins v. *Taxing District of Shelby County*, 120 U. S., 489, 502;

the court settled the question of the right of the state to interfere. The facts in the case are identical with the case at bar, except that Robbins, the plaintiff in error, was soliciting orders for paper in Tennessee, for a non-resident principal in Ohio, while in this case, Delameter, the plaintiff in error, was soliciting orders for liquor in South Dakota for a non-resident principal in Minnesota. The court said, *Ibid.*, 497:

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. *Interstate commerce can not be taxed at all, even though the same amount of tax should be laid on domestic commerce,* or that which is carried on solely within the state. This was decided in the State Freight cases (*supra*). The negotiations of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. A New Orleans merchant can not be taxed there for ordering goods from London or New York, because in the one case, it is an act of foreign, and, in the other, of interstate commerce, both of which are subject to regulation by Congress, alone."

And again, the court says, *Ibid.*, p. 498:

"If the selling of goods by sample, and the employment of drummers for that purpose, injuriously affect the local interest of the state, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And *Congress, alone, can do it;* for it is obvious that such regulations should be based on a uniform system, applicable to the whole country, and not left to the varied, discordant or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject, would be but a repetition of the disorder which prevailed under the Articles of Confederation."

To the same effect is

Corson v. *State of Maryland,* 120 U. S., 502, 506.

A tax of the character imposed by the Legislature of South Dakota was a direct interference with interstate commerce; and the result plainly shows that it absolutely deprives the resident of

another state from attempting to sell his goods, because the South Dakota Act complained of not only requires one license for the entire state, but requires a license in every "township, precinct, town and city," thereby absolutely preventing a non-resident from doing business, as the amount of the license fees would be more than the amount of the business transacted. This court has held this illegal and contrary to the commerce clause of the Constitution so often that it is almost a worn out question, but nowhere has it been so definitely settled as in the case of

Brennan v. *City of Titusville*, 153 U. S., 289, 308.

The court, through Mr. Justice Brewer (pp. 297, 298), said:

> "The question in the case is whether a manufacturer of goods, which are unquestionably legitimate subjects of commerce, who carries on his business of manufacturing in one state can send an agent into another state to solicit orders for the products of his manufactory without paying to the latter state a tax for the privilege of thus trying to sell his goods.
>
> "It is true in the present case, the tax is imposed only for selling to persons other than manufacturers and licensed merchants; but if the state can tax for the privilege of selling to one class it can for selling to another, or to all. In either case, it is a restriction on the right to sell, and a burden on lawful commerce between citizens of two states. It is as much a burden upon commerce to tax for the privilege of selling to a minister as it is for that of selling to a merchant. It is true, also, that the tax imposed is for selling in a particular manner, but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at dwelling house, is merely a regulation of commerce."

The case of

Caldwell v. *North Carolina*, 187 U. S., 622, 624,

was a much stronger case against the plaintiff in error than the one at bar. In that case the merchandise was shipped into the state of North Carolina to the order of the seller, and an agent of the seller was sent to North Carolina, and this agent secured the merchandise in bulk, broke the package and delivered same to the purchasers. In the present case the agent for Lewis L. Metzger & Co. simply secured the order in South Dakota and then forwarded the same to his principal, and the principal delivered the goods f. o. b. cars at St. Paul, Minnesota. No step was taken in South Dakota, except to take the order.

In the Caldwell case (*Ibid.*, p. 633), the court (through Mr. Justice Shiras) said:

> "Transactions between manufacturing companies in one state, through agents, with citizens of another, constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from state taxation, but if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution.
>
> It can not escape observation that efforts of this kind, in the interest of the states where the purchasers reside have been frequently made in the form of statutes and municipal ordinances, but that such efforts have been heretofore rendered fruitless by the supervising action of this court. The cases hereinbefore cited disclose the truth of this observation." *Ibid.*, pp. 632, 633.

The latest expression of the court, and one which, we think, settles beyond peradventure the question of the right of the state to interfere with commerce of the character the plaintiff in error was engaged in, is the case of

Norfolk & Western Ry. Co. v. *Sims*, 191 U. S., 441, 451.

On page 446, *Ibid.*, the court, through Mr. Justice Brown, says:

> "To the ordinary mind it seems a somewhat startling proposition that a manufacturing corporation, located and doing its main business in a distant city, having no manufactory in North Carolina, no stock in trade, no place for the sale of its goods there, and no agent authorized to sell them, can be compelled to take out a license required of all those "engaged in the business of selling," from the mere fact that it had done what hundreds of others were doing daily—sent a single machine there upon a written order of a customer, and under an ordinary C. O. D. consignment. If this may be done the revenues of every state may be largely increased by adopting a similar system, since a large part of the business of retail shops in the principal cities is done by orders received, filled and the goods delivered in the same way. Of course, it is impossible to estimate the number of business houses in other states which are accustomed to collect their accounts in this manner.
>
> "If this were the law, it would also follow that the consignor of every cargo of wheat sent to New York for export under a bill of lading, accompanied by a draft for the payment of the money in the usual method, might be compelled to take out a license in the state of New York as a dealer in produce, notwithstanding that all the real business was done in Chicago or North Dakota.
>
> "So, too, what the state may do directly, it may authorize its municipalities to do, and if, under legislative sanction, each of the large towns in the state of North Carolina saw

fit to adopt a similar license tax, the consequence would be, not a simple interference with interstate commerce, but a practical destruction of one important branch of it.

"While it may be entirely true that the property in the things sold does not pass under a C. O. D. consignment until delivery of the goods and payment to the carrier, and hence it may be said that the sale is not completed until then, yet, as a matter of fact, the bargain is made, and the contract of sale completed as such, when the order is received in Chicago, and the machine shipped in pursuance thereof.

"A sale really consists of two separate and distinct elements: first, a contract of sale, which is completed when the offer is made and accepted; and, second, a delivery of the property which may precede, be accompanied by, or follow the payment of the price, as may have been agreed upon between the parties. The substance of the sale is the agreement to sell, and its acceptance. That possession shall be retained until the payment of the price may or may not have been a part of the original bargain, but in substance it is a mere method of collection, and we have never understood that a license could be imposed upon this transaction, except in connection with the prior agreement to sell, although, in certain cases arising under the police power, it has been held that the sale is not complete until delivery, and sometimes not until payment. Were it not for the opinion of the Supreme Court of the state of North Carolina, we should have said that the words "engaged in the business of selling the same within the state," had reference to the word "selling" in its popular and ordinary sense of selling from a stock on hand, or upon a special order to a manufacturer, and not to a mere method of collecting the money; but, however this may be, it is evident the state courts could not give to it a construction which would operate as an interference with interstate commerce, and that upon this question the opinion of this court is controlling."

* * * * * * * * * * * * * * * * *

Therefore, it is apparent that the court in this case had no right to interfere unless liquor stands in a different category from other articles of merchandise by virtue of what is known as the Act of Congress of August 8, 1890, known as the Wilson Bill.

This, we insist, is not the case, and this court has repeatedly so decided.

In the case of

Rhodes v. *State of Iowa*, 170 U. S., 412-438.

this court through Mr. Justice White very thoroughly analyzed what is known as the Wilson Bill, and holds that the Act of Congress of August 8, 1890, does not apply to shipments, except when they shipped into a state for re-sale. After discussing the phraseology of the Act, the court said, Ibid., p. 423:

> "If it had been the intention of the Act of Congress to provide for the stoppage at the state line of every interstate commerce contract relating to the merchandise named in the Act, such purpose would have been easy of expression. The fact that such power was not conveyed, and that, on the contrary, the language of the statute relates to the receipt of the goods 'into any state or territory for use, consumption, sale or storage therein,' negatives the correctness of the interpretation holding that the receipt into any state or territory for the purposes named could never take place. Light is thrown upon the purpose and spirit of the Act by another consideration. The Bowman case was decided in 1888, the opinion in *Leisy* v. *Hardin* was announced in April, 1890, the act under consideration was approved August 8, 1890. Considering these dates, it is reasonable to infer that the provisions of the act were intended by Congress to cause the legislative authority of the respective states to attach to intoxicating liquors coming into the states by an interstate shipment only after the consummation of the shipment, but before the sale of the mer-

chandise, that is, that the one receiving merchandise of the character named, whilst retaining the full right to use the same, should no longer enjoy the right to sell free from the restrictions as to sale created by state legislation, a right which the decision in *Leisy* v. *Hardin* had just previously declared to exist.

"This view gives meaning and effect to the language of the act providing that such merchandise 'shall not be exempt therefrom' (legislative power of the state) by reason of being introduced therein in 'original packages or otherwise.' These words have no place or meaning in the act, if its purpose was to attach the power of the state to the goods before the termination of the interstate commerce shipment. The words 'original packages' had, at the time of the passage of the Act by the decisions of this court, acquired with reference to the construction of the Constitution, a technical meaning, signifying that the merchandise in such packages was entitled to be sold within a state by the receiver thereof, although state laws might forbid the sale of merchandise of like character not in such packages.

"While it is true that the right to sell free from state interference, interstate commerce merchandise was held in *Leisy* v. *Hardin* to be an essential incident to interstate commerce, it was yet but an incident, as the contract of sale within a state in its nature was usually subject to the control of the legislative authority of the state. On the other hand, the right to contract for the transportation of merchandise from one state into or across another involved interstate commerce in its fundamental aspect, and imported in its very essence a relation which necessarily must be governed by laws apart from the laws of the several states, since it embraced a contract which must come under the laws of more than one state. The purpose of Congress to submit the incidental power to sell to the dominion of state authority, should not without the clearest implication,

be held to imply the purpose of subjecting to state laws, a contract which in its very object and nature, was not susceptible of such regulation even if the constitutional right to do so existed, as to which no opinion is expressed."

The court then goes on to show by authority that it was never intended to give the various states any control over interstate transactions, except for re-sale purposes.

Perhaps a stronger case, and one more like the case at bar is that of

Vance v. *Vandercook Co.*, 170 U. S., 438-468.

It appears that in this case appellee, a California corporation, was the owner of large vineyards in California, from which it produced large quantities of brandies, etc.; that through its traveling agent it took orders from certain residents of South Carolina to deliver to each of them certain original packages of wines and brandies, and seventy-three packages in one case were actually shipped, and the authorities of South Carolina seized the packages, and the court held the seizures were illegally made, contrary to the interstate commerce clause of the Constitution, and not warranted by the Wilson Bill.

The points of similarity between the Vandercook case, *Ibid.*, and the case at bar are many. The firm for which plaintiff in error traveled in Minnesota, sent its agent to South Dakota to secure orders and these orders to be delivered f. o. b. cars St. Paul, Minn., and the state authorities arrested the agent. In the case cited, *Ibid.*, the state authorities confiscated the goods. The result remains the same, except in the case at bar the man's liberty was involved, and in the case cited merely the merchandise. One method just as surely as the other, destroys the

interstate commerce, and prevents the freedom of trade which should exist between the various states. In the Vandercook case, the court said:

> "But the weight of the contention is overcome when it is considered that the interstate commerce clause of the Constitution guarantees the right to ship merchandise from one state into another, and protects it until the termination of the shipment by delivery at the place of consignment, and this right is wholly unaffected by the Act of Congress which allows state authority to attach to the original packages before sale, but only after delivery. *Scott* v. *Donald,* and *Rhodes* v. *State of Iowa, supra.* It follows that under the Constitution of the United States every resident of South Carolina is free to receive for his own use liquor from other states, and that the inhibitions of a state statute do not operate to prevent liquors from other states from being shipped into such state, on the order of a resident for his use. This demonstrates the unsoundness of the contention that if state agents are the only ones authorized to buy liquor for sale in a state, and they select the liquor to be sold from particular states, the product of other states will be excluded. They can not be excluded if they are free to come in for the use of any resident of South Carolina who may elect to order them for his use. The products of other states will be, of course, excluded from sale in the original packages in the state, but as the right of the state to prevent the sale in original packages of intoxicants coming from other states, in consequence of the state law, forbidding the sale of any but certain liquor, attaches to the original packages from other states, by virtue of the Act of Congress, the inability to make such sales arises from a lawful state enactment. To hold the law unconstitutional because it prevents such sale in the original package would be to decide that the state law was unconstitutional, because it exerted a power which the state had a lawful right to exercise.

Indeed, the law of the state, here under review, does not purport to forbid the shipment into the state, from other states, of intoxicating liquors for the use of a resident, and if it did so, it would, upon principle, and under the ruling in *Scott* v. *Donald,* to that extent, be in conflict with the Constitution of the United States. It is argued, that the foregoing considerations are inapplicable since the state law now before us, whilst it recognizes the right of residents of other states to ship liquor into South Carolina for the use of residents therein, attaches to the exercise of that right such restrictions as virtually destroy it.

"But the right of persons in one state to ship liquor into another state, to a resident for his own use, is derived from the Constitution of the United States, and does not rest on the grant of the state law. Either the conditions attached by the state law unlawfully restrain the right or they do not. If they do—and we shall hereafter examine this contention—then they are void. If they do not, then there is no lawful ground of complaint on the subject."

In the case of the

American Express Company v. *State of Iowa,* 196 U. S., 133-146,

the court went even a step further, and held that liquor shipped C. O. D. from one state to another was interstate commerce; that the title of the goods passed when same was delivered to the carrier, and that any interference by the state authorities with the merchandise was illegal, unless the goods were offered for re-sale, and the court re-affirms the law as laid down in the many cases heretofore cited, and then says, *Ibid.,* pp. 143, 144, 145:

"Coming to test the ruling of the court below by the settled construction of the commerce clause of the Constitution, expounded in the cases just reviewed, the error of its conclusion is manifest. Those cases rested upon the broad principle of the freedom of commerce between the states, and of the right of a citizen of one state to freely contract to receive merchandise from another state, and of the equal right of the citizen of a state to contract to send merchandise into other states. They rested, also, upon the obvious want of power of one state to destroy contracts concerning interstate commerce, valid in the states where made. True, as suggested by the court below, there has been a diversity of opinion concerning the effect of a C. O. D. shipment, some courts holding, that under such a shipment, the property is at the risk of the buyer, and, therefore, that delivery is completed when the merchandise reaches the hands of the carrier for transportation; others deciding that the merchandise is at the risk of the seller, and that the sale is not completed until the payment of the price, and delivery to the consignee, at the point of destination.

"But we need not consider this subject. Beyond possible question, the contract to sell and ship was completed in Illinois. The right of the parties to make a contract in Illinois for the sale and purchase of merchandise, and, in doing so, to fix by agreement the time when and condition on which the completed title should pass, is beyond question. The shipment from the State of Illinois into the State of Iowa of the merchandise constituted inter-state commerce. To sustain, therefore, the ruling of the court below would require us to decide that the law of Iowa operated in another state so as to invalidate a lawful contract as to inter-state commerce made in such other state; and, indeed, would require us to go yet further, and say that, although, under the inter-state commerce clause, a citizen in one state had a right to have merchandise consigned from another state delivered to him in the state to which the shipment

was made, yet that such right was so illusory that it only obtained in cases where, in a legal sense, the merchandise contracted for had been delivered to the consignee at the time and place of shipment.

"When it is considered that the necessary result of the ruling below was to hold that, wherever merchandise shipped from one state to another is not completely delivered to the buyer at the point of shipment so as to be at his risk from that moment, the movement of such merchandise is not inter-state commerce, it becomes apparent that the principle, if sustained, would operate materially to cripple, if not destroy, that freedom of commerce between the states which it was the great purpose of the Constitution to promote. If upheld, the doctrine would deprive a citizen of one state of his right to order merchandise from another state at the risk of the seller as to delivery. It would prevent the citizens of one state from shipping into another unless he assumed the risk; it would subject contracts made by common carriers, and valid by the laws of the state where made, to the laws of another state; and it would remove from the protection of the inter-state commerce clause all goods on consignment upon any condition as to delivery, express or implied. Besides, it would also render the commerce clause of the Constitution inoperative as to all that vast body of transactions by which the products of the country move in the channels of inter-state commerce by means of bills of lading to the shipper's order, with drafts for the purchase price attached, and many other transactions essential to the freedom of commerce, by which the complete title to merchandise is postponed to the delivery thereof."

The vast weight of authority from *Gibbons* v. *Ogden*, 9 Wheat., p. 1, to the *American Express Company* v. *Iowa*, 196 U. S., 133, is so conclusive of the propositions involved in this case that there can be no question but that the action of the

authorities of South Dakota was void, because it was an effort to control inter-state commerce, and contrary to the provisions of Section 1, Article VIII., of the Constitution; and it also appears perfectly plain that no State Legislature can pass any such law to so regulate commerce between the states, without the authority of Congress first given, and that the Wilson Bill did not extend such authority; and, furthermore, it is a very doubtful proposition as to whether Congress can in any event delegate its control over inter-state commerce to the Legislature of the various states.

WAS THE REGULATION IMPOSED BY SECTION 2834 OF THE REVISED POLITICAL CODE OF SOUTH DAKOTA A TAX ON INTERSTATE COMMERCE?

It is apparent that the license fee proposed to be charged by the state of South Dakota was a direct effort to levy a tax on liquor commerce—state and inter-state.

As stated in the case of

Robbins v. *Taxing District of Shelby County,* 120 U. S., 489, 502:

> "It would not be difficult, however, to show that the tax authorized by the state of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples; while the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents; and if they had, they are not subject to any tax therefor. They are taxed for their licensed

houses, it is true; but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition.

"And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon inter-state commerce, but that it is intended to have that effect as one of its principle objects. And if a state can, in this way, impose restrictions upon inter-state commerce for the benefit and protection of its own citizens, we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principle causes that led to it." *Ibid.*, 497.

In the case at bar the entire question of whether or not the entire Act of the Legislature is a police regulation or merely a method of raising revenue is clearly settled by the Legislature itself.

The original Act fixing the license tax was passed by the Legislature at its session in 1901, and does not in any manner prohibit the sale of liquor, but simply fixes the license fees. At the same session and within a few days after its passage, an Act amending the section of the original Act, fixing the license fees, was passed as follows:

"CHAPTER 144.

"Relating to the Manufacture and Sale of Intoxicating Liquors.

"An Act to amend Section 7 of Chapter 72 of the Ses-

sion laws of 1897, being an Act regulating the manufacture and sales of intoxicating liquors.

"Be it enacted by the Legislature of South Dakota:

"Amendment.

"SEC. 1. That Section 7 of Chapter 72 of the Session Laws of 1897, the same being an Act relating to the sale of intoxicating liquors, entitled 'An act to provide for the licensing, restriction and regulation of the manufacture and sale of spirituous and intoxicating liquors' be amended to read as follows:

"SEC. 7. *Duty of County Treasurer.* All moneys received by any county treasurer under Section 1 of this Act shall be by him placed to the credit of the general fund of the county.

"SEC. 2. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

"Approved, February 14, 1901."

See Session Acts South Dakota, 1901, p. 246.

This makes plain the object of the Legislature—merely the raising of revenue.

The claim that the tax imposed was an "occupation tax" and, therefore, allowable, although it affected inter-state commerce, is answered by this court in the case of

Caldwell v. *North Carolina,* 187 U. S., 622, 633.

On pages 627 and 628 the court, through Mr. Justice Shiras, says:

"*Asher* v. *Texas*, 128 U. S., 129; 32 L. Ed., 368; 2 Inters. Com. Rep., 241; 9 Sup. Ct. Rep., 1, was a case where a state statute required from 'every commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax," and such legislation was declared inoperative, so far as it affected one soliciting orders for a business house in another state. The same doctrine was held in *Stoutenburgh* v. *Hennick*, 129 U. S., 141; 32 L. Ed., 637; 9 Sup. Ct. Rep., 256, in the case of an agent of a Maryland business house soliciting orders in the District of Columbia without having taken out a license as required by an Act of the Legislature Assembly of the District of Columbia.

"In *Lyng* v. *Michigan*, 135 U. S., 161; 34 L. Ed., 150; 3 Inters. Com. Rep., 143; 10 Sup. Ct. Rep., 725, the general proposition was repeated:

" 'We have repeatedly held that no state has the right to lay a tax on inter-state commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason, that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.'

"In *Crutcher* v. *Kentucky*, 141 U. S., 47; 35 L. Ed., 649; 11 Sup. Ct. Rep., 851, an act of the state of Kentucky which forbade the agent of an express company, not incorporated by the laws of that state, from carrying on business without first obtaining a license from the state, was held to be a regulation of commerce and invalid. Mr. Justice Bradley, speaking for the court, said:

" 'The character of police regulation, claimed for the requirements of the statutes in question, is certainly not such as to give them a controlling force over the regulations of

inter-state commerce which may have been expressly or impliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon inter-state, any more than upon foreign commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void.'"

In the case at bar no goods were shipped, so far as the record shows—the tax is for soliciting the orders.

It has been well settled that in such cases as the one at bar the sale does not take place in South Dakota but in Minnesota.

See

American Express Company v. *Iowa,* 196 U. S., 133-146.

In this case it is clear that no title passed to the goods proposed to be sold because the principal reserved the right to accept or reject the orders—the goods being sold on sixty days time, and the principal reserving the right to say who he would trust. The money at the end of sixty days was to be sent to St. Paul. (See page 13 of this Record.)

WAS SECTION 2834 OF THE REVISED POLITICAL CODE OF SOUTH DAKOTA A POLICE REGULATION?

We have shown heretofore that the Act of the Legislature of the State of South Dakota was not a regulation in the interest

of the morals of the community—that its only purpose was to license and raise revenue. So it is true that it is not a police regulation. There is nothing in the record anywhere which indicates that the Act proposed to be enforced was for the betterment or the morals or the safeguarding of the health or wellfare of the community.

In other words, the case does not come within the rule laid down in the case of

Austin v. *Tennessee*, 179 U. S., 343, 388.

In the case just cited, it was clearly a police regulation. See statement of case by Mr. Justice Brown, p. 343.

In the case at bar, however, there is no such state of affairs or facts. It appears that orders were taken for a less quantity than five gallons—that these goods were to be shipped by freight directed to the purchaser. In the Austin case the packages were of insignificant size and value, and the court expressly says, p. 344:

> "We are not disposed to question the general principle that the states can not, under the guise of inspection or revenue laws, forbid or impede the introduction of products, and more particularly of food products, universally recognized as harmless (*Minnesota* v. *Barber*, 136 U. S. 313, 34 L. Ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. Ed. 862, 3 Inters. Com. Rep. 485; 11 Sup. Ct. Rep. 213), or otherwise burden foreign or inter-state commerce by regulations adopted under the assumed police power of the state, but obviously for the purpose of taxing such commerce or creating discriminations in favor of home producers or manufacturers. Passenger cases 7 How. 283, 12 L. Ed. 702; *Welton* v. *Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Henderson* v. *New York*, 92 U. S. 259, sub nom.; *Henderson* v. *Wickham*, 23 L. Ed.

543; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. Ed. 527; *Guy* v. *Baltimore*, 100 U. S. 434, 25 L. Ed. 743; *Ward* v. *Maryland*, 12 Wall. 418, 20 L. Ed. 449; *New York* v. *Campagnie Generale Transatlantique*, 107 U. S. 59, 27 L. Ed. 383, 2 Sup. Ct. Rep. 87. In this connection we indorse fully what was said by this court in the case of *Mugler* v. *Kansas*, 123 U. S. 623, 661; 31 L. Ed. 205, 210; 8 Sup. Ct. Rep. 273: 'If therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.' "

This entire decision is based upon the ground as stated by the court (pp. 344, 345), that the packages were not legitimate subjects of commerce because of their character. In this case it appears that the merchandise was to be shipped by freight. From its very nature, the court must presume that before the railroad company would receive the goods they must be properly boxed and packed—and being brittle necessarily cased in wood. The court must also presume that the package was of considerable size, otherwise the freight charges between the points mentioned would amount to more than its value.

In the Austin case it appeared the goods were in small boxes a few inches long and broad and containing articles of small value. There is nothing of the kind indicated here.

This court knows that five gallons of whiskey is a valuable article of commerce, and that its probable value will not be less than fifteen dollars, (the Government tax alone being $5.50) and probably nearer thirty dollars. If the state can, under the police regulation keep out a package of this character—it could under

the same cloak make it ten, or fifteen, or any other number of gallons and thereby nullify all the decisions of this court regulating inter-state commerce.

This court has recognized a $3.85 shipment of liquor as inter-state commerce.

See

American Express Company v. *Iowa,* 196 U. S., 133-146.

This shipment was in fact only a gallon shipment. Will the court now say that a shipment five times as large as this was within the power of the state to stop?

If Congress thought it best for the state to control the liquor traffic it could have said so, but in the passage of the Wilson Bill it simply gave power to stop re-sale, and now the states are asking this court, under the guise of police power, to do what Congress has refused.

The case of

Cook v. *Marshall County,* 196 U. S., 261, 275,

is a similar case to the Austin case, and the decision apparently turns on the character of packages.

The court must remember that a large portion of the retail trade of the county is now done by express, by mail, and by agents, and to permit the various states to regulate the trade will create as great confusion as existed in the days of the Confederation. These regulations must be by Congress, or not at all, and we respectfully insist that Congress alone can regulate.

However, this court has expressly held that a package of much less value than a four gallon package of whiskey is not the subject for interference by a state under the supposed police power, and in language especially fitting to the case.

See

Schollenberger v. *Penn.*, 171 U. S., pp. 1-30.

On page 24 the court says:

"We are not aware of any such distinction as is attempted to be drawn by the court below in these cases between a sale at wholesale to individuals engaged in the wholesale trade or one at retail to the consumer. How small may be an original package is not necessary to here determine. *We do say that a sale of a ten-pound package of oleomargarine, manufactured, packed, marked, imported and sold under the circumstances set forth* in detail in the special verdict, was a valid sale, although to a person who was himself a consumer. We do not say or intimate that this right of sale extended beyond the first sale by the importer after its arrival within the state. .*Waring* v. *The Mayor* (*Waring* v. *Mobile*), 75 U. S., 8 Wall., 110-122 (19: 342-346). The importer had the right to sell not only personally, but he had the right to employ an agent to sell for him. Otherwise his right to sell would be substantially valueless, for it can not be supposed that he would be personally engaged in the sale of every original package sent to the different states in the Union. Having the right to sell through his agent, a sale thus affected is valid.

"The right of the importer to sell can not depend upon whether the original package is suitable for retail trade or not. His right to sell is the same, whether to consumer or to wholesale dealers in the article, provided he sells them in original packages. This does not interfere with the acknowledged right of the state to use such means as may be necessary to prevent the introduction of an adulterated article, and for that purpose to inspect and test the article introduced, provided the state law does really inspect and does not substantially prohibit the introduction of the pure article, and thereby interfere with inter-state commerce. It can not, for the purpose of preventing the introduction of

an impure or adulterated article, absolutely prohibit the introduction of that which is pure and wholesome. The Act of the Legislature of Pennsylvania, under consideration, to the extent that it prohibits the introduction of oleomargarine from another state and its sale in the original package, as described in the special verdict, is invalid."

CONCLUSION.

We respectfully submit that the record and authorities show:

First: That the Act of the State of South Dakota was a regulation of inter-state commerce.

Second: That said Act can not be sustained upon the theory that it is not a tax on inter-state commerce, because the record shows that it undoubtedly was.

Third: That said Act can not be sustained by any appeal to the police power of the state.

Therefore, we respectfully ask that the decision of the Supreme Court of South Dakota, and the decision of the Circuit Court of the Sixth Judicial District of South Dakota, be reversed, and the lower courts directed to dismiss the plaintiff in error from custody.

HERBERT JACKSON,
Attorney for Plaintiff in Error.

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JAMES H. McKENN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 149.

JAY DELAMATER, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH DAKOTA

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF FOR DEFENDANT IN ERROR

BY S. M. HOWARD,
State's Attorney of Potter County, South Dakota.
Attorney for Defendant in Error.

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Attorney for Defendant in Error.

2 STATEMENT OF THE CASE.

May it Please the Court:

At the March Term of the Circuit Court held in and for the county of Potter and state of South Dakota in the year 1904, the Plaintiff in Error was tried and convicted of the crime of selling intoxicating liquors by solicitating orders therefor at and within said county in quantities of less than five gallons each to persons who were not dealers in ardent spirits without having previously thereto obtained a license so to do. The information char-
3 ges that these sales were made on the 10th day of February, A. D. 1904.—(See Record, p. 11.)

The evidence and agreed statement of facts presented in the trial court show these sales were made to citizens of said county of Potter for future delivery, on sixty days' time; and also, that the plaintiff in error claimed to act on behalf of a firm located in the city of St. Paul in the State of Minnesota.—(See Record, p. 2.)

The plaintiff in error was duly convicted of the

* Thereupon, the Plaintiff in Error carried the case by Writ of Error to the Supreme Court of South Dakota where, on August 22, 1905, the judgment rendered in the trial Court was affirmed; whereupon, the original Defendant brought the case to this most Honorable Court by Writ of Error.

crime charged in the information and duly sentenced
4 by the trial court to pay a fine of two hundred and fifty dollars; and that, in default of such payment, he be confined in the county jail of said county of Potter for the period of one hundred and twenty-five days,—the same being one day for every two dollars of said fine, or until said fine be paid.—(See Record, p. 17.)

Strangely enough, the facts which constitute the commission of the crime charged in the information, on which plaintiff in error was found guilty and sentenced, are not in anywise disputed or denied. The evi-
5 dence was too conclusive to admit of successful contradiction. On the contrary, the facts charged in the information in the trial court all stand admitted by the plaintiff in error.—(See Record, p. 25.)

It is also admitted by counsel for plaintiff in error in the trial court, that the facts thus both proven and admitted constitute an open violation of §2834 of the Revised Political Code, 1903, of the State of South Dakota, commonly known as the License Law.—(See Record, p. 26.)

But it is proper here to state that the attorney for
6 plaintiff in error in the trial court contended that said section of the Revised Code of South Dakota was in conflict with the powers of congress and of §8, Art. 1, of the Federal Constitution.—(Record, p. 26.)

Briefly stated, these constitute the facts involved in the case at bar.

ARGUMENT.

Although the case at bar, so far as the plaintiff in error is concerned, involves the imposition of a fine of $250.00 only, which is certainly a matter of no tran-
7 scendant importance, yet, so far as the State of South Dakota is concerned, and the people of the United States generally, it also involves the underlying principles of our whole system of Federal and State governments, and more especially, a careful consideration and construction of §8 of Art. 1 of the Federal Constitution. It may thus readily be seen that the case at bar, in reality,

is one of vast importance and cannot receive too careful consideration by this most honorable court. This should certainly be borne in mind always, even from the
8 beginning.

For the purpose of a clear consideration of the law governing the case at bar, the argument thereof will be presented under the following subdivisions, to-wit:

I.—The original powers of each of the several States to Regulate, Control or Prohibit the Traffic in Intoxicating Liquors.

II.—The power of Congress to Regulate, Control or Prohibit the Traffic in Intoxicating Liquors within the limits of the sev-
9 **eral States of the Union, outside of the District of Columbia, Military Reservations and other places within the exclusive jurisdiction of the United States. And of these:**

1.—The powers of Congress from the convening of the first continental Congress in October, 1765, onward till February 4, 1887, the latter be-
10 **ing the date of approval of the Act to Regulate Commerce with foreign countries and Inter-State, commonly known as the Inter-State Commerce Act. And,**

2.—The power of Congress from and after the passage and approval of the Inter-State Commerce Act, February 4, 1887, onward to August 8, 1890, the date of the Act to Limit the Effect of the Inter-State Commerce
11 **Act, commonly known as the Wilson Act. And,**

3.—The power of Congress to Regulate,

Control or Prohibit the Traffic in intoxicating Liquors within the limits of the several States of the American Union since the passage and approval of the Wilson Act.

III.—The power of the several States of our Republic to Regulate, Control or Prohib-
12 **it the Traffic in Intoxicating Liquors within the limits of each from the date of the approval of the Wilson Act, August 8, 1890, onward to the present time.**

IV.—Assignments of Error by Plaintiff in Error.

And these divisions will be taken up in the foregoing order.

13 1.

1. The Original powers of each of the several States to Regulate, Control or Prohibit the Traffic in Intoxicating Liquors.

When the original States won their independence from Great Britain, which was acknowledged by the treaty of Paris, Sept. 3, 1783, they thereupon became both sovereign and independent. Bear well in mind always, that it was the *States* which then became sovereign and independent, and not our *Government* under the con-
14 stitution, for that was not inaugurated till the 4th of March, 1789, or nearly six years subsequent to the treaty of Paris, by means of which the sovereignty of the States became assured. And if the several States became sovereign then, and continue to exist to the present time, they must be sovereigns still, except as to those matters only over which their sovereignty has been reliequished or

surrendered. This is a proposition of logic which admits of no argument.

The next inquiry which naturally follows is,
15 Have the several states ever surrendered their sovereignty, or any part or portion of the same? And if so, When and where was such surrender made? Who made the surrender? To whom was it made? And who were present?

These are the *all-important questions* for this most honorable Court to determine in the case at bar; for thereon hang the decisive issues of this cause.

If the entire sovereignty of the original States, or any portion of such sovereignty, has ever been sur-
16 rendered, relinquished or ceded, such surrender, relinquishment or ceding must have taken place either at the time of the adoption of the Articles of Confederation in 1781, or at the time of the adoption of the Federal Constitution in 1788, or some of the amendments thereto; for it could not have been accomplished on any other occasion.

This leads us, in the first place to a careful consideration of The Articles of Confederation, adopted by the several States in 1781.

17 In construing this organic act, "We must not lose sight of the fact, "says Judge Sanborn, "That the sole object to be sought, in the interpretation of a law, is the *intention* of the legislative body which enacted the law; and that rules of construction are only serviceable as they assist us to attain that object."

In re Clerkship of C. Ct., 90 Fed. 251;
Kohlsaat v. Murphy, 96 U. S. 160;
Butler v. Russell, 3 Clif. (U. S.) 255;
Budd v. Budd, 59 Fed. 741;
18 Rogers v. Nashville, etc., R. Co., (C. C. A.), 91 Fed. 322.

The controlling rule of decision in applying a statute in any particular case is that, whenever the *intention* of the legislature can be discovered from the words

employed, in view of the subject matter *and all the surrounding circumttances,* it ought to prevail, unless it leads to absurd or irrational conclusions.

1 Fed. Stat. Ann. xxii;

Per Justice Clifford, Kohlsaat v. Murphy, 96
19 U. S. 160.

Always keeping the foregoing rules of construction well in mind, as to the *intention* of the States, let us examine with care and research all the surrounding circumstances which led the 13 original States onward to the adoption of the Articles of Confederation, sometimes called the Old Constitutinn.

It should be remembered always, that the Articles of Confederation were finally adopted after long and serious debate and discussion; and also that, for a long per-
20 iod of time during that discussion, it was a very serious question whether they would ever be adopted.

A committee to draft the Articles of Confederation was appointed by the Continental Congress on the 12th day of June, 1776.

8 Fed. Stat., p. 7, Note.

Upon the report of this committee, the Articles were debated, from time to time, till the 15th day of November of the following year, when they were submitted to the legislatures of each State. They were thereup-
21 on discussed over again thoroughly by the members of the legislature of each State for a protracted period of-four years before their final adoption,

8 Fed. Stat. p, 7, Note.

The several States were certainly exceedingly jealous of their sovereign powers. This was the great bone of contention. This was the rock on which the ship of state came very near foundering. They wished and longed for a common goverament, but each state feared to yield to that common government any of its sovereign pow-
22 ers. But after five years consumed in discussion, they finally yielded to the Confederation a very few of those powers, all of which were clearly defined.

So jealous were the several States on this point that, the first provision they made in the Articles of Con-

federation, after providing for the style of the confederacy, was the insertion of the following comprehensive restriction upon the powers of sovereignty of the government thereby created, to-wit:

"Each State retains its sovereignty, freedom and in-
23 dependence, *and every power, juridiction and right, which is uot by this confederation* expressly delegated to the United States in Congress assembled."

Mark well this important factt: That it was only subject to the foregoing comprehensive restriction upon the powers of the Federal Congress that the States would proceed a single step in the surrender of any portion of their respective sovereignties.

Hence it follows that *"Every power, jurisdic-*
24 *tion and right, which is not by this Confederation expressly delegated to the United States in Congress assembled;* was then and there reserved to the States respectively.

The Articles of Confederation remained in full force till the adoption of our Constitution, June 21, 1788, covering a period of 7 years, 3 months and 20 days.

Van Brocklin v. Tennessee, 117 U. S. 159.

And from that time onward to the present moment, they still remain in force, except as otherwise provided
25 in the Federal Constitution.

I challenge the learned counsel for the plaintiff in error to point out the section in the Articles of Confederation which contain any delegation of tha *police powers* of any of the several States to the Congress, Oo the contary, it is perfectly apparent that the seveaal States retained each and all of their police powers, and that they never would have consented to the confederation without retaining same intact.

But the people of the several States soon discovered
26 they had created no Federal government, –that is,–no government with power to govern.

The Articles of Confederation provided for no chief executive, no cabinet, no Federal army, no commander-in-chief thereof, witeout the consent of nine States, no power to

raise revenue, no Federal Judiciary or Supreme court. In fact, the Articles of Confederation did not pretend to create a Federal government, but only a League. for Art. III provides:

"The said States hereby severally enter into a
27 firm league of friendship with each other," etc.

From the foregoing, it becomes perfectly apparent that the several States parted with none of their police powers when they adopted the Articles of Confederation. If this be true, then there is but one other instance when and where they could have surrendered them. and that was by the adoption of our present Federal Constitution or some of the amendments thereto; and we will now proceed to examine that organic law and ascertain whether that contains any delegation of the police powers of the sev-
28 eral States.

In examination into the present Federal Constitution, the first thing always to be borne in mind is, that the government of the United States is of *delegated* powers only and that it possesses no inhererent powers whatever; for it is the creature of the people of each of the several States States by States and not of the people of the Republic at large.

"The powers not delegated to the United States by the Constitution, or prohibited by it to the States.
29 are reserved to the States respectively, or to the people. "–(Art. X, Federal Constitution.)

Although the foregoing Article constituted no part of our present constitution, when first adopted, yet it never would have been adopted, if it had not been well understood that this article was soon to be added thereto.

2 Bancroft His. Constitutior U S., 269.

Art. X, Federal Constitution.

Before the State of Massachusetts would consent to the adoption of the Federal Constitution, that State
30 insisted on the addition thereto of the following specific amendment which, in substance, constitutes Art. X, to-wit:

"All powers not expressly delegated to Congress, are

reserved to the several States."

2 Banc. His. Const. U. S. 269;

2 Elliott, Debates on Federal Const. 177.—*

And the State of New York was still more tenacious on this point, for that State reserved the right to withdraw from the Union, after a specified number of years,
31 unless the following amendment, now embraced in Art. X, should also be incorporated in the Constitution, to-wit:

"*Provided,* That no power shall be exercised by Congress, but such as is expressly given by this Constitution; and all others, not expressly given, shall be reserved to the respective States, to be by them exercised."

2 Elliot, Debates Federal Const. 406.

The State of Pennsylvania also took a similar stand, for in the State convention held at Harrisburg, Sept. 3,
32 1888, the following provision was adobted, to-wit:

"That Congress shall not exercise any powers whatever, but such as are expressly given to that body by the Constitution of the United States; nor shall any authority, power or jurisdiction be assumed or exercised by the executive or judiciary departments of the Union under color or pretence of construction or fiction; but all of the rights of sovereignty which are not by the said Constitution expressly and plainly vested in the Congress, shall be deemed to remain with, and shall be exercised by, the several
33 States in the Union, according to their respective constitutions: and that every reserve of the rights of individuals, made by the several constitutions of the States of the Union, to the citizens and inhabitants of each State respectively, shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution."

2 Elliot, Debates Federal Const. 545.

And the Maryland Constitutional Convention which met at Annapolis, April 21, 1788, unanimously adopted
34 the following:

"That Congress shall exercise no power but what is expressly delegated by this Constitution."

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* All references herein to Elliots's Debates refer to the Lippincott Edition of 1901.

2 Elliot, Debates Federal Const, 550.

The Constitutional Convention of Virginia, on the 27th day of June, 1788, proposed the following amendment:

"That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government."

3 Elliott, Debates Fed. Const. 659.

The Constitutional Convention of North Carolina, on the 1st day of August, 1788, also adopted the last preceding proposed amendment *et literatim.*

4 Elliott, Debates Fed. Const. 244.

In the South Carolina Convention, Aug. 1, 1788, the committee proposed the following amendment:

"1.–That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States, or to the departments of the Federal government."

4 Ellliot, Debates Fed. Const. 244.

I have been unable to find anything like a complete record of the proceedings in the constitutional conventions of any of the other States; but think it safe to assume that all thereof joined in with the foregoing enumerated States in favoring the adoption of the Xth amendment to the Federal Constitution, and that, without this understanding, the Constitution would never have been ratified by the States; and hence, never would have become the organic law of the land.

Bear in mind always that the first ten amendments to the Federal Constitution were made in full pursuance of the foregoing recommendations of the several States, and that they were proposed at the first session of Congress under the Constitution and were adopted soon afterward.

Relative thereto, a learned historian says:

"The first group, including ten amendments, made immediately after the adoption of the Constitution, ought to be regarded as a supplement or postscript to

it, rather than as changing it."

4 Patton His. U. S. 104.

From all of which it is most clearly shown that Art. II, of the Articles of Confederation, hereinbefore set forth *hec verba*, was the chief corner-stone of both the Articles of Confederation and the Federal Constitution.

Hence it clearly follows, as certainly as night the day, that the States retained each and all their un-
39 limited powers so sovereignty, excepting those only which were 'Expressly delegated to Congress."

I call upon the learned counsel for plaintiff in error to show this Court, from either the Articles of Confedaration or the present Federal Constitution, a single clause wherein any portion of the original police powers of the several States was ever *expressly* ceded or surrendered by the States to Congress.

And it certainly needs no argument to prove that unless so ceded or surrendered, the several states
40 still retain all their original police powers, and that Congress never had, and never can have, any jurisdiction or control thereof.

Hence it follows that, in entering on a consideration of the delegated powers of Congress, we should always keep before us and bear well in mind, this important restriction to the jurisdiction of Congress, without which said restriction the several States would never have entered the Confederation, and without which, our present Constitution would never have been ratified by the States and
41 without which, the Federal Congress would never have had any jurisdiction or power to legislate upon any subject whatever.

Bear well in mind always, that the several States became sovereign long before the Congress under the Constitution was ever authorized, existed or had a being. Bear well in mind also, that the power which wrenched that sovereignty from Great Britain, was the same power which created the Articles of Confederation, the new Constitution

and the amendments thereto, and also the Congress
42 and Government of the United States of America.

It is certainly a proposition of logic too clear for discussion here that the *creature* cannot be superior to the *creator;* and this is just as true in temporal affairs as it is in theology. Hence follows this inevitable conclusion: *That the creature,—the Federal Government—cannot be superior to its creator—the several States—excepting as to those matters only which were expressly surrendered by the States to the Federal Government.*

43 Hence it follows that, inasmuch as the several States possessed every identical power of sovereignty when they threw off that of Great Britain, they still possess all these powers of sovereignty, except a very few which they surrender to the Federal Congress.

The question which next in order arises, so far as the case at Bar is concerned, is: Have the States ever surrendered to Congress the right to regulate, control or prohibit the traffic in intoxicating liquors within the jurisdiction of the State? And if so, I call upon the learned
44 counsel for the plaintiff in error to show us when and where the States have surrendered their power to Congress.

During the whole period of time which elapsed from the meeting of the first Continental Congress, October, 1765, onward to the ratification of the Article of Confederation in March, 1781; and from that time onward to March, 4th, 1789, when proceedings first began under our present Constitution,—embracing a period of 23 years 5 months,—I challenge the counsel for plaintiff in error to pro-
45 duce a single instance in which the Continental Congress either legislated or undertook to legislate upon the traffic in intoxicating liquors within the jurisdiction of any of the several States of the American Union. On the contrary it is a matter of universal notoriety that the annals of legislation of the Continental Congress, during all that

period of time are as silent as the tombs of the departed upon this question.

The foregoing facts and deductions would seem to
46 establish the fact beyond successful contradiction that the original right to regulate, control or prohibit the traffic in intoxicating liquors belonged expressibly to the States in severalty, and not to the Continental Congress.—

II—The power of Congress to Regulate, Control or Prohibit the Traffic in intoxicating Liquors within the limits of the several States of the Union, outside of the District of Columbia,
47 ## Military Reservations and other places within the exclusive jurisdiction of the United States.

And of these:

1.—The powers of Congress from the convening of the first continental Congress in October, 1765, onward till February 4, 1887, the latter being the date of approval of the Act to Regulate Commerce with foreign countries and Inter-State, commonly known as the Inter-State Commerce Act

The proposition that during this whole period of
48 time, to-wit: From October, 1765, onward to February 4,1887, the several States retained and exercised the right to regulate, control or prohibit the traffic and intoxicating liquors in their own way, independent of any outside control, is clearly established by an unbroken current of authorities, among which I cite the following:

United States

In re Raher, 140, U. S., 145 ;
Cunnini, v. Tillman, 54 Fed. Rep. 969;
49 Munn v. Illnois, 94 U. S., 113;
Bartemeyer v. Iowa, 18th Wall. 129;
Tanner v. Alliance, 29, Fed. Rep. 196;
Foster v. Kansas, 112, U. S. 205§
Eclenbocker v. Plymouth County, 134 U. S. 31;
Mugler v. Kansas, 123 U. S., 623;
Kansas v. Bradley, 26 Fed. Rep. 289;
In re Brosmhan, 18 Fed. Rep§ 62;
License cases. 5th Howe, 504:

50 Boston Beer Co. v. Massachusetts, 97 U. S. 25;
Crowley v. Christensen, 137, U. S., 86;

Georgia:

Howell v. State, 71 Ga., 225;
Pardue v. Ellis, 18 Ga., 586

Illinois:

Jones v. The People, 14, Ill., 196;
Kettering v. Jacksonville, 50th Ill., 39;
Schwuchow v. Chicago, 68 Ill., 444;
Swift v. Klein, 163 Ill., 269;

51 Indian Territory:

U. S. v. Cohn, 52 S. W. 38;

Iowa:

Kaufman v. Dostal, 73 Ia., 691;
McLain v. Bonn, 70 Ia., 752;
Craig v. Florange, 71 Ia., 761;
McLane v. Leicht, 69 Ia., 401;
Drake v. Kaiser, 73 Ia., 703;
Dickinson v. Heebe Brew. Co., 73 Ia., 705;

52 Santo v. State, 2 Ia., 165;
State v, Donchey, 8 Ia., 396.

Kansas:

State v. Lindgrove, 1 Kan. App., 51;
Haug v. Gillett, 14 Kan., 142 4/4
State v. Whisner, 35 Kan., 277;
Prohib. Amendment Cases, 24 Kan., 700;
Foster v. State, 22 Kan., 765;

Kentucky:

53 Stickrod v. Com. 86 Ky., 285;
Com. v. Weller, 14 Bush., 218;

Michigan:

People v. Gallagher, 4 Mich., 244:
People v. Hawley, 3 Mich., 330;

Missouri:

Austin v. State, 10 Mo., 591;

Nebraska:

Hunzinger v. State, 39 Neb., 652;

54 Shannon v. State, 39 Neb., 658;
Soehl v. State, 39 Neb., 659;

Rowels v. State, 39 Neb., 659;

Rhode Island:

State v. Fitzpatrick, 16 R. I., 185;
State v. Paul, 5 R. I., 185;
State v. Keenan, 5 R. I., 497;

North Dakota:

State ex rel Bartlett v. Fraser, 1 N. D., 425;

55 South Dakota:

State v. Brennan, 2 S. D., 384;
Territory v. O'Connor, 5 Dak., 397;
City of Elk Point v. Vaughn, 1 S. D., 108;
Minneapolis Brew. Co. v. McGillvray, 104 Fed., 252;

Vermont:

State v. Lovell, 47 Vt., 493;

Wisconsin:

State v. Ludington, 33 Wis. 107.

It is believed to be unnecessary to stop and argue
56 upon the many points which has been determined by our Courts of last resort, both State and Federal, in this long list of decision. So far as the case at bar is concerned, I simply wish to place on record this broad assertion: That throughout the whole period of the time covered by these cases, it is nowhere held or intimated that Congress had exercised, or had claimed the right to exercise, any authority on the part of the Federal Government to interfere in any way, or regulate in any way, the traffic in
57 intoxicating liquors within the jurisdiction of any one of the several States of the Union, prior to the passage of the Commerce Act, generally called the Inter-State Commerce Act, of February 4, 1887.

2.—The power of Congress from and after the passage and approval of the Inter-State Commerce Act, February 4, 1887, onward to August 8, 1890, the date of the Act to Limit the Effect of the Inter-State Commerce Act, commonly known as the Wilson Act.

58 If the position heretofore taken, to-wit: That the power to regulate the Liquor Traffic was never delegated or surrendered by the States to Congress, then it follows as a matter of course that Congress had no jurisdiction over the subject matter thereof, any more than it has over the questions of marriage and divorce, the Quarantine Laws, the Exemption Laws, the common rights to ownership of property, the right to regulate the punishment for burglary, larceny, murder, or any other offences against the criminal laws of the several States. And I apprehend it will not for one moment be contended by counsel for plaintiff in
59 error that Congress has or ever had, any jurisdiction or right to legislate upon, or control in any way, any of these specified subjects.

And up to the Passage of the Inter-State Commerce Act, it was never contended or seriously intimated by Congress that it had any authority whatever to legislate upon any of these questions.

But it is a matter of history as well as of common notoriety that, ever since the advent of the Civil War onward to the passage of the Wilson Act, there has
60 been prevailing in the popular minds a growing tendency to centralize the powers of the people more and more in the Federal Congress. This tendency to centralization has also produced an effect to a greater or less extent, upon our Courts of last resort, both State and Federal.

As a result of this growing tendency towards centralization, immediately after the passage of the Inter-State Commerce Act, it was strongly contended by the advocates of the centralized powers ofCongress that, in the passage of the Inter-State Act, Congress had assumed jurisdic-
61 tion of the traffic and intoxicating liquors within the jurisdiction of the several States; and the reupon, for the first time in the History of Federal Legislation, it was seriously contended that the power was conferred upon Congress by subdivision 3 of section eight of article one of the Federal Constitution to regulate the traffic in intoxicating liquors within the limit of the several States.

In pursuance of this growing tendency towards centralization, several decisions were rendered by some of
62 the State's Supreme Courts and by some of the District and Circuit Courts of the United States holding, in substance, that by the adoption of the Inter-State Commerce Act, Congress had assumed jurisdiction of the legislature upon the traffic in intoxicating liquors within the jurisdiction of the several States; and hence that the States could not control the same during the period of time between the passage of the Inter-States Commerce Act and the passage of the Wilson Act. Among the cases so holding I cite the following:

63 State v. Hannaphy (Iowa) 90th N. W. 601;
Megler v. Kansas, 123 U. S., 662;
Boston Beer Co. v. Massachusetts, 97 U. S., 25;
State v. Frappart, 31 La., Ann. 340;

Bear in mind always that these decisions cover the period of time only between the passage of the Inter-State Commerce Act February 4, 1887, and the passage of the Wilson Act, August 8, 1890. From these decisions it may readily be seen that some of our Courts were holding, throughout this period of time, that Congress had
64 the exclusive right to regulate and control the traffic in intoxicating liquors, in persuance of the said Commerce Clause of the Federal Constitution. The position, as we shall see further on, was not justified by the organic law of the land.

In reviewing the whole History of legislation upon this subject, both State and Federal, it becomes perfectly apparent to the eye of reason that, in the passage of the Inter-State Commerce Act, it was not the intention of Congress to interfere with the police powers of the
65 State to control the traffic in intoxicating liquors; for no sooner had it become apparent that a contrary construction was being placed upon the Inter-State Commerce Act by some of the Courts, both State and Federal, than Congress itself came to the rescue in a most effective way by the passage of the Wilson Act, defining and limiting the scope of the Inter-State Commerce Act.

III—The power of Congress to Regulate Control or Prohibit the Traffic in in toxicating Liquors within the limit of the several States of the American Union since the passage and approval of the Wilson Act August 8th 1890.

67 The position then taken by some of our State Courts and by some of the lower Federal Courts, holding that under the Inter-State Commerce Act, Congress had assumed jurisdiction over Inter-State traffic in Intoxicating Liquors, and hence that the State Legislatures had been thereby deprived of their original police powers, which they had theretofore exercised continuously from 1765 down to that date to regulate, Prohibit and Control the traffic in intoxicating liquors within their own respective jurisdictions, at once aroused a spirit of dissatisfaction and
68 dissent from one end of our Republic to the other; for if correct, it went to establish the doctrine that the people of the States, by this unwarranted assumption of power by Congress, were now for the first time deprived of their right to control the traffic in intoxicating liquors.

Harrell v. Speed, (June 4th, 1904) 113 Ten. 224; 1 L. R. A. (N. S.) 639.

By many good people it was looked upon as a most dangerous invasion of the rights of the States to protect themselves from the effects of one of the most gigantic
68 evils which had ever prevailed in this country. It was also everywhere looked upon as the most unwarranted interference by Congress,—if such had been the intent of Congress,—with the police powers of the respective States, which the States had always exercised continuously before the creation of Congress and onward to the date of that Act.

This broad-spread spirit of dissent and dissatisfaction with the supposed unwarranted assumption of power, soon produced its effect even upon Congress itself,
69 and resulted in the speedy passage by Congress of

"An Act to limit the effect of the regulations of Commerce between the several States and with foreign countries in certain cases," which provides as follows to-wit:

"That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage, therein, shall upon arrival in said State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers
70 to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (3 Fed. Statutes Annotated, 853;26 Stat. L.313).

This constitutes what is generally known as the Wilson Act, and was evidently passed for two purposes, to-wit: First, for quieting the rising indignation of the people heretofore referred to; and second, to limit and define the *intention* of Congress in the exactment
71 of the Inter-State Commerce Act.

It would seem to appear conclusively from this Wilson Act that, in the enactment of the Inter-State Commerce Act, Congress never intended for one moment to interfere with the well established rights of the States to regulate the Traffic in intoxicating liquors within their own jurisdiction; for it declares that, on "arrival in such State or Territory," such intoxicating liquors shall "be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to
72 the same extent and in the same manner as if those liquids or liquors had been produced in such State or Territory." And it needs no argument to show that if the intoxicating liquors in question in the case at bar, had been produced in the State of South Dakota that it would have been subject exclusively to the laws of that State; and that, in such case, no one would have claimed that the Inter-State Commerce Act had anything whatever to do with the

transaction. Hence it follows that, in the passage of the Inter-State Commerce Act, Congress never intended
73 to meddle or interfere with the police power of the respective States, or with the right to control, regulate or prohibit the traffic in intoxicating liquors within their respective limits.

Bear in mind also that in the passage of the Wilson Act Congress expressly declares that the traffic in intoxicating liquors comes within the exercise of the police powers of the States. Here is a declaration by Congress itself that the traffic in intoxicating liquors comes within the exercise of the police powers of the respective States. And
74 if this be true then it follows too clearly for argument of the contrary, that Congress never had any right to legislate upon this subject; and that, if it undertook so to do, the Act would be unconstitutional and void.

Hence it follows that all these and other decisions of our Courts granted during the period of time intervening between the passage of these two Acts of Congress, swept away entirely by the passage of the Wilson Act. In other words, the holding of these decisions fall to the ground by the passage of the latter Act, just as the woodman
75 falls the trees of the forest.

The purpose of Congress in enacting this statute was clearly to allow the State Laws to operate upon intoxicating liquors shipped into one State from another, notwithstanding it remains in the original package.

In re Rahrer (1891) 140 U. S., 545;
Rhodes v. Iowa (1898) 110 U. S., 412;
Vance v. Vandercook Co. (1898) 170 U. S., 445;
Minneapolis Brewing Co. v. McGillivray, (1900) 104 Fed., 258;
76 In re Bergan (1900) 115 Fed. Rep., 329;
Jervey v. The Carolina (1895) 66 Fed. Rep., 1013;
Lottery Cases (1903) 188 U. S., 361;
Fred. Miller Brewing Co. v. Stephens (1897) 102 Ia. 60.

No sooner had the Wilson Act become a law than it was assailed by the entire liquor interests of the country at large upon the ground that it was an unconstitutional

attempt to delegate through the State the power to regulate Inter-State Commerce; but the constitutionality of the Wilson Act has been completely upheld and maintained by
77 many decisions of our Courts of last resorts among which I cite the following:

In re Spickler, (1890) Fed. Rep., 653;
In re Van Vliet, (1890) 43 Fed. Rep., 761;
In re Rahrer, (1891) 140 U. S., 545;
State v. Fraser, (1891) 1 N. Dak., 425;
Com. v. Clahane, (1891) 154 Mass., 116;
Rhodes v. Iowa 170 U. S., 412;
Vance v. Vandercook, Co., 170 U. S.;
State v. Fraser (1891) N. D., 425;

78 It was also contended by those representing the liquor interest of the country, that, in order for the States to be able to control the traffic in intoxicating liquors within their borders, it was necessary for the legislature of the States to enact new laws subsequent to the passage of the Wilson Act, in order to carry the provisions of the latter law into effect; but this contention, like the former one, has been made completely explicit by many decisions of our Courts, among which I cite the following:

In re Rahrer (1891) 140 U. S., 545;
79 Enert v. Missouri, (1895) 156 U S., 321;
In re Spickler, (1890) 43 Fed. Rep. 653;
In re Van Vliet, (1890) 43 Fed. Rep., 761;
In re Jordan, (1892) 49 Fed Rep,, 238;
Tinker v. State, (1890) 90 Ala., 638;
Fred Miller Brewing Co. v. Stevens, (1897) 102 Ia., 60;
Com. v. Calhane, (1891) 154 Mass., 115,
Com. v. Gagne, 150 Mass., 205;
80 State v. Fraser, (1891) 1 N. Dak., 425;
State v. Lord (1891) 66 N. H., 479;
Starace v. Rossi (1897) 69, Vt., 303.

It was also contended by the same interest that liquors imported into a State *before*, but sold *after*, the

enactment of the statute, was not subject to the State Laws. But this position, like the former two, was completely upset by the following decision:

Tinker v. State, (1890) 90 Ala., 638.

81 We have heretofore insisted throughout this argument that the several States of the Union originally possessed the power to regulate, control or prohibit the traffic in Intoxicating Liquors prior to the adoption of either the articles of Confederation or our present Constitution, and that they have never surrendered that power or delegated the same to Congress; and in support thereof, and for the purpose of showing beyond all controversy that no new powers were conferred upon the State by the Wilson Act, but that that Act was simply a recognition

82 that the several States always had possessed and always had retained this power, I cite the following authorities:

In re Rahrer, (1891) 140 U. S., 564;
Rhodes v. Iowa, (1898) 170 U. S., 412;
Ex parte Edgerton, (1893) 59 Fed. Rep. 115;
In re Langford, (1893) 57 Fed. Rep., 575;
Jervey v. The Corolina, (1895) 66 Fed. Rep., 1013;
State v. Lord, (1891) 66 N. H., 479;
Corbin v. McConnell, (1902) 71, N. H., 352;

83 Wilkerson v. Rahrer 140 U. S., 574.

This long list of authorities establishes the fact beyond successful contradiction that no new powers were conferred upon the States by Congress in the passage of the Wilson Act; for if the power to regulate the traffic in intoxicating liquors had been conferred upon Congress by the National Constitution, it must follow that Congress could not confer that right upon the States, for that would certainly be a violation of the Constitution; and hence it conclusively follows that the States have always possessed,

84 from the Treaty of Paris in 1783 onward to the present time the power to regulate the traffic in intoxicating liquors within their respective borders in their own way and

subject to no restriction whatever on the part of Congress or the Federal Government.

That the importer of intoxicating liquors can sell only on the terms prescribed by the local statutes, is a question which appears to be settled by the following authorities:

Reymann Brewing Co. v. Brister, (1900) 179 U. S., 455;

85 Vance v. Vandercook Co. (1898) 179 U. S., 438;

In re Rahrer, (1891) 140 U. S., 545;

Minneapolis Brewing Co. v. McGillivray, (1900) 104 Fed. Rep., 258;

Indianapolis v. Bieler (1893) 138 Ind., 30;

Com. v. Calhane, (1891) 54 Mass., 116;

People v. Vorhies, Mich. (1902) 91 N. W., 624;

State v. Vixman, (1901) 162 N. O., 1;

State v. Lord (1891) 66 N. H., 479;

Eg. Loan & Sec. C. v. Edwardsville (1905) 38 So.

86 Reporter, 1016;

Pabst Brew. Co. v. Crenshaw (1905) 25 So. Reporter, 552.

Hence it must follow that if the importer of intoxicating liquors can sell only on the terms prescribed by local Statutes, the sales of intoxicating liquors charged in the information in the case at bar, must be governed by the Statue of South Dakota, to-wit: By Art. 6, Chapter 27 Political Code, 1903, which requires such vendor to have a license therefor and to pay a license fee of $200.00.

87 From the foregoing list of authorities, it can readily be seen that the supposed assumption of power by Congress, in the Interstate Commerce Act, to legislate upon the traffic of intoxicating liquors between the several States, is without foundation in fact: for this Court has held under the Wilson Act, that the several States remain in the same condition, so far as the regulation of the liquor traffic is concerned, that they held before the date of the passage of the Inter-State Commerce Act.

III.—The power of the several States of our Republic to Regulate, Control or Prohib-

88 **it the Traffic in Intoxicating Liquors**

within the limits of each from the date of the approval of the Wilson, Act August 8, 1890, onward to the present time.

After the foregoing long review of legislation and judicial construction thereof, extending from the beginning of the Independence of the States onward to the passage of the Wilson Act, it seems conclusively to appear that the
89 present Statute of traffic in intoxicating liquors, Inter-State or otherwise, remains to-day in precisely the same condition it occupied on the assumption of sovereignty by the original State; that is, that it still belongs to the police power inherent to the sovereignty of each of the several States of the American Union. This is certainly a great triumph for the welfare of the people at large; for if the right to regulate the police affairs of the States has been usurped by Congress and withheld from the legislature of the States, then there would have remained no pos-
90 sible way by means of which the Inter-State Traffic in Intoxicating Liquors could have been controlled by the State. This would have resulted in the repeal of more wise legislation upon this subject than Congress would be likely to enact for centuries to come; and I will not stop to portray the deplorable results which must have followed.

Let it suffice to premise that, if such had been the case, then our prohibition Statutes, and all Statutes regulating the traffic in intoxicating liquors within the several States, might just as well be tumbled into an immense
91 pile and consumed by fire; for they certainly would be of no further use.

If, then, our course of reasoning is found to be supported by the authorities cited, it must follow as a matter of course that the traffic in intoxicating liquors, Inter-State or otherwise, stands in precisely the same condition to-day that it occupied prior to the Inter-State Commerce Act. If this be true, it must also follow that the States still possess full sovereignty over this traffic; or, as has been conclusively shown, the several States have
92 always exercised jurisdiction over the subject matter from a period of time long prior to the adoption

of the Federal Constitution onward to the present moment. And it has also been shown that during the whole of this period of time Congress has never undertaken to legislate ubon this subject at all; for by the passage of the Wilson Act, Congress has declared that it did not intend to legislate upon the traffic of intoxicating liquors in the passage of the Inter-State Commerce Act; and this was the only instance in which it could be claimed with any show of success
93 that Congress had ever undertaken to legislate upon this question. And this long period of non-action by Congress, is a strong proof that Congress never had any authority to legislate upon this subject.

THE POLICE POWER OF THE STATES.

From the beginning of sovereignty in the several States after throwing off that of Great Britain, onward to the present time, the several States of the Union have continuously exercised the right to control their police affairs in the same manner that they have controlled their
94 more serious criminal affairs in general, always subject to no outside control. And it has never been seriously contended, prior to the passage of the Inter-State Commerce Act, that Congress had any right to legislate upon these affairs.

True enough it is, from time to time, there has arisen a difference of opinion between contending interests as to just what was included within the police power of the States; but whenever and wherever it has been once conceded that a given subject came within the legitimate police
95 powers of the States, this settled the whole question, and the jurisdictions of the States thereupon has been universally conceded up to the date of the passage of the Inter-State Commerce Act. Always heretofore the chief difficulty has been to define and determine the exact line of demarkation of the legitimate police powers. As this honorable court has said, "the intervening colors bebetween white and black flow into each other in such a manner, it is sometimes difficult to mark the bounduries of each. Very much likewise is it with the subjects of police
96 power and the rights of Commerce; and the great

difficulty and endless conflict of decision upon these questions has mostly arisen in determining that line of demarkation; for, when the boundaries thereof has been once defined, there has been but little in determining its true Status.

This boundary, so far as the Inter-State traffic in intoxicating liquors is concerned, was very clearly determined and defined by Mr. Justice Carton of this Court, so long ago as 1847, in delivering his opinion in what is
97 the "Liquor Case," reported in 5th Howard, page 569 et seq. In a case under consideration by this Court at that time, a barrel of gin had been purchased in Boston, Mass., by Pierce et al., of the State of New Hampshire, and had been brought coast-wise by water near to Dover, N. H., where it was sold in the same barrel and condition in which it had been purchased in Boston, in violation of the Statute of New Hampshire, which required the vendor of ardent spirits to procure a licence therefor engaging in the sale thereof. The defendants were duly convicted in the
98 State trial Court, which conviction was affirmed by the Supreme Court of the United States by virtue of a writ of error. In delivering the opinion of this Court in that cause, Mr. Justice Carton in part says:

"To a true understanding of the power conferred on Congress to regulate commerce among the States it may be proper briefly to confer as to their condition and acts before the Constitution was adopted, in this respect."

"And in regard to the third, (foreign and inter-state commerce) Congress has stood by for nearly sixty
99 years, and seen the States regulate the commerce of the whole country, more or less. at the ports of entry and at all their borders, without objection, and for this court now to decide that the power did not exist and that all they had done in this respect was void from the beginning, would overthrow and annul entire codes of State legislation on the particular subject. We would by our decision expunge more State laws and city corporate regulations than Congress is likely to make in a century on the subject, and on no better assumption than that Congress and State
100 Legislatures had been altogether mistaken as to their

respective powers for fifty years or more. **If long usage, general acquiescence, and the absence of complaint can settle the interpretation of the clause in question, then it should be deemed as settled in conformity to the usage of the Courts.**

"And as Congress and the courts have conceded that the States may pass laws regulating the militia, and on the subject of bankruptcies, and that the affirmative
101 grants of power to Congress in these instances did not deprive the States from exercising the power until Congress acted, it is now too late, under existing circumstances for this court to say that the similar affirmative power to regulate commerce with foreign nations and among the States shall be held an exclusive power in Congress; as it could no more be done with consistency of interpretation, than with safety to the existing state of the country.

"In proceeding on this moderate, and, as I think, prudent and proper construction, all further difficulty
102 will be obviated in regard to the admission of property into the States; this the States may regulate, so they do not tax; and if the States (or any one of them) abuse the power, Congress can interfere at pleasure, and remedy the evil, nor will the States have any right to complain. And so the Courts can interfere if the States asume to exercise an excess of power, or act on a subject of commerce that is regulated by Congress. As already stated, **It is hardly possible for Congress to deal at all with the details of this complicated**
103 **matter**

"This case before us presents a fair illustration of the difficulty; all venders of spirits produced in New Hampshire are compelled to be licensed before they can lawfully sell; this is not controverted, and cannot be. **To hold that the State license law was void, as respects spirits coming in from other States as articles of commerce, would open the doors to an almost entire evasion,** as the spirits might be introduced in the smallest divisible quantities that
104 the retail trade would require; the consequence of which would be, that the dealers in New Hampshire would sell only spirits produced in other States, and that the products of New Hampshire would find an unrestrained

market in the neighboring States having similar license laws to those of New Hampshire."

And Mr. Justice Catron concludes as follows:

"That the law of New Hampshire was a regulation of commerce among the States in regard to the article for selling of which the defendants were indicted and
105 convicted; but that the State law was constitutionally passed, because of the power of the State thus to regulate; there being no regulation of Congress, special or general, in existence to which the State law was repugnant.

"And for these reasons, I think the judgment of the State court should be affirmed."

License Cases, 5 How. 608–9.

And Mr. Justice Woodbury, concurring, states his reasons therefor in part as follows:

106 But this license is a regulation neither of domestic commerce between the States, nor of foreign commerce. It does not operate on either, or the imports of either, till they have entered the State and become component parts of the property. Then it has by the Constitution the exclusive power to regulate its own internal commerce and business in such articles, and bind all residents, citizens or not, by its regulations, if they ask its protection and privileges; and Congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the States
107 can interfere in regulation of foreign commerce. If the proposition was maintainable, that without any legislation by Congress as to the trade between the States (except as that in coasting, as before explained, to prevent smuggling), anything imported from another State, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or internal regulation of a State, then it is obvious that the whole license system may be evaded and nullified, either from abroad or from a neighboring State. And the more especially
108 can it be done from the latter, as imports may be made in bottles of any size, down to half a pint of spirits or wines; and if its sales cannot be interfered with, and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuita-

ble persons, with perfect impunity."

"From the first settlement of this country, and in most other nations, ancient or modern, civilized or savage, it has been found useful to discountenance excesses in the use of intoxicating liquors. And without entering
109 here into the question whether legislation may not on this as other matters, become at times intemperate, and react injuriously to the salutary objects sought to be promoted, it is enough to say, under the general aspect of it, that the legislation here is neither novel nor extraordinary, nor apparently designed to promote other objects than physical, social and moral improvement. On the contrary, its tendency clearly is to reduce family expenditures, secure health, lessen pauperism and crime, and co-operate with, rather than counteract, the apparent policy of the general government itself in respect to the disuse of ardent spirits.

"They aim, then, at a right object. They are calculated to promote it. They are adapted to no other. And no other, or sinister, or improper view can, therefore, either with delicacy or truth, be imputed to them."

"It is the undoubted and reserved power of every State here, as a political body, to decide, independent of any provisions made by Congress, though subject not to conflict with any of them when rightful, who shall compose its population, who become its residents, who its citizens, who enjoy the privileges of its laws and be entitled to their protection and favor, and what kind of property and business it will tolerate and protect."

License Cases, 5 How. 629.

And Mr. Justice Grier, concurring, states his reasons therefor, in part as follows:

"It has been frequently decided by this court, 'That the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified and conclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be afirmed, that every law for the restraint and punishment of crime, for the preservation of the public

peace, health, and morals, must come within this category."

"As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience or luxury, to recede, when they come in conflict or collision, "*salus populi suprema lex.*"

"If the right to control these subjects be 'complete, unqualified and exclusive' in the State legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others.

"It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo, and cast it overboard. The soldier and the sailor, *though in the service of the government*, are arrested, imprisoned, and punished for their offenses against society. Paupers and convicts are refused admission into the country. All these things are done, not from any power by which the States assume to regulate commerce or to interfere with the regulation of Congress, *but because police laws for the preservation of health, prevention of crime, and protection of the public welfare*, must of necessity have full and free operation, according to the exigency which requires their interference.

"It is not necessary for the sake of justifying the State legislation now under consideration to array the appalling statistics of misery, pauperism and crime, which have their origin in the use or abuse of ardent spirits. *The police power, which is exclusively in the States*, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power, or of legislation, as between the States and the United States; each is acting within its sphere, and for the public good, and if a loss of revenue should accrue to the United States from a diminished con-

sumption of ardent spirits, she will be the gainer a thousand fold in the health, wealth and happiness of the people."

License Cases, 5 How. 631,632.

And Mr. Chief Justice Taney, concurring, states his reasons therefor in part as follows:

"Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For, although the gin sold was an import from another State, and Congress has clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet, as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue."

License Cases, 5 How. 586.

The foregoing extracts from the opinions of the judges of the Supreme Court of the United States in the famous License cases, have been inserted here at some length for this important reason: Because the complete opinions cover an area of 77 pages in 5 Howard; and hence, it would entail much labor on this Court thoroughly to investigate the opinions in detail, from alpha to omega. But if this Court has the time and disposition so to do, I trust it will be done; for herein hinges the fundamental principiples which underlie the case at bar.

The foregoing cases were decided in 1847, just forty years before the passage of the Inter-State Commerce Act. But the Supreme Court therein construes Sec. 8 of Art. 1, of the Federal Constitution, which gives to Congress its only power to regulate commerce with foreign countries, as well as Interstate. And hence, the Inter-State Commerce Act itself must be governed by this construction of the constitution which gives to Congress its only power to legislate upon this subject.

And I now pass on to a decision of the same Court in the case of Wilkerson v. Rahrer, decided at the October term, 1890, three years subsequent to the passage of the Inter-State Commerce Act, and three months subsequent to the passage of the Wilson Act; and I would call the especial attention of this court to the fact that, in this case,

thus decided subsequent to the passage of both said acts, the Supreme Court of the United States takes substantially the very same ground it had taken in the License cases forty-three years before.

In this case of Wilkerson v. Rahrer, it was agreed that Maynard, Hopkins & Co., are citizens and resident of the State of Missouri, and are partners doing business at Kansas City, State of Missouri, under the firm name of Maynard, Hopkins & Co; that said firm was doing a general business in Kansas City, Mo., in the sale of intoxicating liquors; that they do a general business of packing and shipping intoxicating liquors from their place of business in Kansas City, Mo., to various points in the State of Kansas and other States; that in June, 1890, said Maynard, Hopkins & Co. constituted and appointed the petitioner herein, Charles Rahrer, their lawful agent in the city of Topeka, Kansas, to sell and dispose of for them in original packages liquor shipped by said Maynard, Hopkins & Co., from the State of Missouri to Topeka, Kansas; that in July, 1890, said Maynard, Hopkins & Co. shipped to the city of Topeka, Kansas, from Kansas City, Mo., a carload of intoxicating liquors, packed by them and shipped from Kansas City, Mo., to Topeka, Kansas, to their agent, Charles H. Rahrer; that Charles H. Rahrer on the 9th day of August, 1890, offered for sale and sold one pint of whisky, which was a portion of the liquor shipped by Maynard, Hopkins & Co., as above stated; that said pint of whisky was sold in the same condition in which it was shipped from the state of Missouri, and received into the state of Kansas; that it was separate and distinct from every package of liquor so shipped, and was sold in the same package in which it was received, being securely enclosed in a wooden box of sufficient size to hold said pint bottle of whisky.

Rahrer was arrested for selling this liquor in violation of the laws of Kansas. It was contended in that case just as it is in this one, that the shipment and sale of the intoxicating liquor in question was governed and controlled exclusively by the Inter-State Commerce Act and Sec. 8 of Art. 1, of the Federal Constitution, and consequently that the prohipition statute of the state of Kansas was in viola-

tion thereof, and therefore null and void. In passing upon that question,—which is precisely the one at bar,—Mr. Chief Justice Fuller in delivering the opinion of the Court says:

"The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and is essentially exclusive.

"And this Court has uniformly recognized state legislation, legitimately for police purposes, as not in the sense of the constitution necessarily infringing upon any right which has been confided expressly or by intimation to the national government.

In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual states and cannot be assumed by the national government, and that in this respect it is not interfered with by the 14th amendment.

"The power of Congress to regulate commerce among the several states, when the subjects of that power are national, is always exclusive. The constitution does not provide that Inter-State commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as for such restraints as Congress might impose."

"Unquestionable, fermented, distilled or other liquids or liquors are subjects of commercial intercourse, exchange, barter and traffic, between nation and nation, and between state and state like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of Courts. Nevertheless, it has been often held that State legislation which prohibits the manufacture of spirituous, malt, vinous, fermented or other intoxicating liquors within the limits of the State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the constitution of the United States or by the amendments thereto These cases, in the language of the opinion in Muggler v. Kansas rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and in doing so, to protect the health, morals and safety of their

people by regulations that do not interfere with the execution of the powers of the general government, or violate rghts secured by the Constitution of the United States. The power to establish such regulatious, as was said in Gibbons v. Ogden, 22 U. S., 9 Wheat. 1, reaches everything within the territory or state not surrendered to the National Government.

"And here the sagacious observations of Mr. Justice Catron, in the License Cases, may profitably be quoted as they have often been before."

Wilkerson v. Rahrer, 140 U. S. 574.

And then follows a quotation from the License Cases hereinbefore cited and referred to, whereby the decision of that Court in the license cases is approved and confirmed.

Bear in mind that this decision, as before stated, was rendered subsequent to the passage of both the Inter-State Commerce Act and the Wilson Act, and holds that the decision in the License Cases is still applicable and governs the case at bar.

In 1891, the identical question involved in the case at bar came before the Supreme Court of North Dakota, and the syllabus by the Court in that case reads as follows:

"Held, further, since the passage by Congress of the law commonly known as the "Willson Bill," that sales of intoxicating liquors in violation of the prohibitory legislation of North Dakota, which are made in this State by a non-resident, through an agent living in this State, are unlawful sales, whether the liquor sold is or is not imported liquor, or whether it is or is not contained in the original cask or package in which it was shipped out of another State or Country.—In re Van Vliet, 43 Fed. Rep. 761; In re Spickler, Id. 653."

State ex rel Bartlet v. Fraser, 48 N. W. 343.

Justices Harlan, Brown and Gray in delivering their opinion in Rhodes vs. Iowa, 170 U. S. 425, use the following language:

"The regulation of the manufacture, sale and use of intoxicating liquors has always been recognized as a subject peculiarly appertaining to the police power of the several States respectively."

And they cite the following cases to sustain their

position: 46 U. S. 5th How. 504; Bartemeyer vs. Iowa, 85 U. S. 18; Boston Beer Co. vs. Massachusetts, 97 U. S., 25; Foster vs. Kansas. 112 U. S., 201; Kidd vs. Pearson, 128 U. S., 1; Eilenbecker vs. Plymouth County District Court 134 U. S., 31.

As a further instance of the rightful exercise of the police power of the State, I would call the attention of this Court to the act of the legislature of this State, passed at that last session thereof, relating to the inspection of oils. This Act requires that all mineral or petroleum oils or any fluid or substance which is the product of petroleum, or into which petroleum or any product of petroleum enters or is found as a constiuent element, whether manufactured in this State or not, shall be submitted to inspection as provided by the act before being offered for sale, and provides that the inspectors shall be entitled to demand or receive from the owner or person calling upon them, etc., the sum of forty cents for testing and marking a single barrel, etc.

Bear in mind always, that kerosine oil is certainly as good a subject of interstate commerce as intoxicating liquors, and is generally conceded to be a great deal more so.

According to the course of reasoning of the Attorney for the plaintiff in error, kerosene oils shipped into this State from any other State, constitutes a matter of Inter-State Commerce, and cannot be controlled or regulated by the legislatures of the respective States for that reason, because it is governed exclusively by the Inter-State Commerce Act; and this course of reasoning would certainly apply with vastly more reason and consistency to oils than to intoxicating liquors.

And yet the constitutionality of this act of our last legislature extending the police powers of this State over the subject of illuminating oils and requiring the same to be inspected, for the purpose of protecting the lives and property and safety of the people of this State against the introduction of dangerous oils, came up only a few months ago before Judge Carland, presiding Judge of the District Court of the United States, at Sioux Falls. It was then and there claimed, just as in the case at bar, that illuminating oils constitute a legitimate subject of Inter-State Commerce;

and that, as such was covered and controlled exclusively by the Inter-State Commerce Act; and hence, that the act of legislation of this State, requiring that such oils should be subjected to inspection, was in violation of the Inter-State Commerce Act, and hence, that it is unconstitutional and void, just as it is claimed in the case at bar, that intoxicating liquors constitute a matter of Inter-State Commerce, hence, can be regulated only by Congress, under the powers thereof derived from the Commerce provision of the Federal Constitution before referred to.

But Judge Carland held,—just as the Supreme Court held in the License Cases, hereinbefore cited,—that an article of commerce which came within the legitimate police powers of the State, could properly be regulated and controlled by the legislature of this State, notwithstanding the Inter-State Commerce Act and the provisions of the Federal Constitution before referred to; and he also held that, in order to protect the property and lives and welfare of the people of the State, the legislature of this State had the right to provide for the inspection of oil and upheld the statute of this State, making provisions therefor.

In fact, there appears to be no end to the authorities holding that, when a given subject comes within the proper police powers of the State, the State has the absolute power to regulate and control it in such a way as best to promote the welfare of its people. All the authorities which have been heretofore cited,—and an almost infinite number of others which might be cited,—go clearly to establish this important poimt.

In the language of Chief Justice Fuller, "The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, *is a power originally and always belonging to the State, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and is essentially exclusive.*"

Bear in mind always, that the foregoing is the lan-

guage of the Chief Justice of the Supreme Court of the United States in delivering his opinion in Wilkerson v. Rahrer, 140 U. S. 574, hereinbefore cited and referred to. What stronger language than this, and from what better authority, could be used to sustain the position of the Defendants in Error in the case at bar?

And again: For the purpose of showing that the several States have always exercised their police powers in requiring licenses of all parties engaging in the traffic of intoxicating liquors, I will cite the following authorities, to-wit:

United States:

Crowley vs. Christensen, 127 U. S., 86;
U. S. vs. Roman, 33 Fed. Rep. 117;
Gray vs. Conn., 159 U. S., 74;
License Tax Cases, 5th Wall. (U. S.), 462;
Miller vs. Ammon, 145 U. S., 421;
Giozza vs. Tiernam, 148 U. S., 657;
Kidd vs. Pearson, 128 U. S., 1;
Reyman Brew Co. vs. Bristor, 92 Fed. Rep. 17.

Arizona:

Territory vs. Connell, 16 Pac., 209.

California:

Matter of Cuerrero, 69th Ca., 88.

Illinois:

Dennehy vs. Chicago, 120 Ill., 627.

Indiana:

Haggart vs. Stehlin, 137 Ind., 42;
Thommason vs. State, 15th Ind., 449;
O'Dea vs. State, 57 Ind., 31.

Kentucky:

Mason vs. Lancaster, 4 Bush., 406.

Louisiana:

State vs. Boston Club, 45 La., Ann., 585;
State vs. Mattle, 48 Ala. Ann., 728.

Maryland:

Teller vs. State, 11 Md., 525.

Massachusetts:

Comm. vs. Fredricks, 119 Mass., 199:
Comm. vs. Bennett, 108 Mass., 27;
Comm. vs. Martin, 108 Mass., 29 note;
Comm. vs. Blackington, 24 Pick., 352.

Michigan:

Wolfe vs. Lansing, 53 Mich., 367;
Kittson vs. Ann Arbor, 26 Mich., 325.

Minnesota:

Rochester vs. Upman, 19 Minn., 108;
Winona vs. Whipple, 24 Minn., 61;
State vs. Cook, 24 Minn, 247.

New Hampshire:

Pierce vs. State, 13 N. H., 536.

New York:

Ingersoll vs. Skinner, 1 Den., 540.

Pennsylvania:

Doberneck's Application, 35 Pa., L. J., 476;
Boyle's Retail Liquor License, 190 Pa. St.

Rhode Island:

State vs. Peckham, 3 R. I., 289.

South Carolina:

Charleston vs. Ahrens, 4 Strodh. L. 241.

South Dakota:

State vs. Brennan, 5 S. D., 384, 50 N. W., 625;
Territory vs. O'Connor, 2 Dak., 397, 41 N. W., 746,
City of Elk Point vs. Vaughn, 1 S. D., 108; 46 N. W., 577;
Minn. Brewing Co. vs. McGillivray, 104 Fed. 252;
State vs. Delamater, (This case) 104 N. W., 537, (1905).

Vermont:

Bancroft vs. Dumas, 21 Vt., 456.

Wisconsin:

State vs. Ludington, 53 Wis., 107;
Tenney vs. Lenz, 116 Wis., 566.

In the case of Pabst Brewing Co. Appt. vs. Crenshaw et al, decided by this Honorable Court so recently as April 17, 1905, involving a statute of the State of Missouri imposing an inspection fee upon beer or other malt liquors shipped from other states into the state, and held there for sale and consumption therein, Mr. Justice White in delivering the opinion of this Court says;

"The subject with which the statute deals is beer and other malt liquors. Plainly, it operates upon such liquors only when manufactured in the State, or, if shipped from other States, after their arrival in the State, and when they are held there for sale and consumption therein.

"It was provided by the act of Congress, commonly styled the Wilson Act (26 Stat. et L. 313, Chap. 728, U. S. Comp. Stat. 1901, p. 3177) as follows:

"'That all fermented, distilled or other intoxicating liquidsor liquors transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory *enacted in the exercise of the police powers,* to the same extent and in the same manner as though suchliquidsor liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.'"

"The scope of this act and the power of Congress to adopt it, was passed upon in the Re Rahrer (Wilkerson vs. Rahrer) 140 U. S., 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

The scope of the act thus stated (P. 565 L. ed. p. 576, Sup. Ct. Rep. p. 868:

"'Congress has now spoken and declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of similar nature.'

"It was decided that, although the act had the effect as stated, it was not repugnant to the constitution of the United States, the Court saying (4562, L. ed. p. 572, Sup. Ct. Rep. p. 869).

"'No reason is perceived why, if Congress chooses to provide that certain designated subjects of Inter-State Commerce shall be governed by a rule which devests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.'

* * * * * * *

"Quite recently, at this term, in American Exp. Co. vs. Iowa. 196 U. S. 133, ante, 182, 25 Sup. Ct. Rep. 182, and Adams Exp. Co. vs. Iowa, 199 U. S., 147. ante, 185, 25 Sup. Ct. Rep., 185, the construction affixed to the Wilson Act in the previous cases was applied, and the power of the State of Iowa to control the sale of liquors shipped from another State into that State, after their delivery to the consignee, was upheld.

"Applying the Wilson Act and the decisions thereunder to the statute here assailed, we think it clear that the contention *that it is repugnent to the Commerce clause of the Constitution is without merit,* unless the reasons urged to show that the present case is not within the scope of the Wilson Act be well founded. We proceed to consider the contentions relied on to establish that proposition.

"1st.—The Wilson Act, it is argued, subjects liquors shipped from one State into another, after their arrival at their destination only, to the 'laws of such state or territory enacted in the exercise of its police powers.' As, it is said, the law of Missouri was not enacted in the exercise of the police power, hence malt liquor received from another State and held in Missouri for sale, retained its character as an article of Inter-State Commerce until sold in the original package.

"In giving the commercial power to Congress, the States *did not part* with that power of self-preservation which must be inherent in every organized community."—Mr. Justice McLean, in Passenger Cases, 7 How. 740.

"And neither the power itself [Police Power], nor the

discretion to exercise it as need may require, *can be bargained away by the State.*" Beer Co. vs. Massachusetts, 97 U. S. 25; Boyd vs. Alabama, 94 U. S., 645.

"But the proposition rests upon the mere assumption that the law of Missouri was not enacted in the exercise of the police power of that State. CERTAINLY THE REGULATION OF THE SALE OF LIQUOR IS ESSENTIALLY A POLICE POWER. SURELY, ALSO, PROVISION MADE IN A STATE LAW TENDING TO DETERMINE THE PURITY OF MALT LIQUORS OFFERED FOR SALE AND CONSUMPTION WITHIN A STATE, IS LIKEWISE AN EXERTION OF THE SAME POWER.

"Conceding that the law in question may be inadequate to accomplish the purpose designed, and produces a large revenue to the State over and above the cost of inspection, this affords no Federal ground upon which to hold that the police power of the State was not brought into play in making the enactment where the law does not operate upon a subject within Federal control. This becomes evident when it is borne in mind that, whether the statute be regarded as a prohibition, as a regulation, as a license, or as an inspection law, if it encroached upon the federal authority it would be void, and on the contrary, in all or any of these aspects, the law would be valid, so far as the Federal Constitution is concerned, if it does not so encroach. The purpose of the Wilson Act is to make liquor, after its arrival, a domestic product, and to confer power upon the States to deal with it accordingly. The police power is, hence, to be measured by the right of the State to control or regulate domestic products —a State, and not a Federal question,—as respects the commerce clause of the Constitution.

* * * * * * *

"To decide that an exertion by a State of its power to regulate the sale of malt liquors manufactured within the State, was an exercise of its police authoriety, and yet to say that the same, when applied to liquor shipped into the State from other States, after delivery, was not an exertion of police power, would be to destroy the Wilson Act and frustrate the very object which it was intended to accomplish; and besides, would overrule the decision of this Court up-

holding and enforcing that statute.

"We need not, however, further consider the subject, *since the relief relied on is not open for discussion*, as a similar contention was expressly ruled upon in Vance vs. Vandercook Co., 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

* * "The confusion of thought which is involved in the proposition to which we have just referred, is embodied in the principle upon which the Court below mainly rested its conclusion. That is, 'if all alcoholic liquors, by whomsoever held, are declared contraband, they cease to belong to commerce, and are within the jurisdiction of the police power; but so long as their manufacture, purchase, or sale, and their use as a beverage in any form, or by any person, are recognized, they belong to commerce, and are without the domain of the police power.' But this restricts the police power to the mere right to forbid, and denies any and all authority to regulate or restrict. The manifest purpose of the act had been to allow the State law to govern the sale of the original package only where the sales of all liquor were forbidden, this object could have found ready expression, whilst, on the contrary, the entire context of the act manifests the purpose of Congress to give to the respective States full legislative authority, both for the purpose of prohibition, as well as for that of regulation and restriction with reference to the sale in original packages of intoxicating liquors brought in from other States."

Pabst Brewing Co. Appt. vs. Crenshaw et al. 25, S. C. R., 552.

In another recent case, this Court lays down the law upon this question as follows: "These decisions rest, it has been said, upon the acknowledged power of the State "to protect the health, morals and safety of the people by regulations that do not interfere with the execution of the powers of the general government." State vs. Brennan, 2 S. Dak. 390. See also Searls vs. Com., 83 Ky., 327; State vs. Gurney, 37 Me., 156. It has also been said, by the Supreme Court of the United States, in considering the power of the State to control traffic in intoxicating liquors: "Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and prosperity of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to pro-

vide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, salus populi suprema lex; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." Boston Beer Co. vs. Massachusetts, 97 U. S. 33. To the same effect are License Cases, 5 How. (U. S.) 504; Mugler vs. Kansas 123 U. S. 625; People vs. Griesbach, 211 Ill. 39."

Here and now I desire to congratulate this Court upon its wise holdings on all these questions; and I wish to do this on behalf of my State and the people generally.

But whilst this Court has thus always held the correct doctrine, yet they have not always agreed upon the reasons for so holding; and from this cause, in my humble opinion, has arisen the most of the confusion of thought among the different members of this Honorable Court.

Whilst this Court, in my judgment, has always reached the right conclusion, yet, in my judgment, the Justices of this Court have not always assigned the true and rightful reasons for such conclusions.

Permit me to say that, in my judgment, this confusion of ideas is sometimes caused by an improper understanding of the respective powers of the Federal and State Governments.

The true reason which should be assigned in support of all these decisions may be stated as follows, to wit;

That the police powers of the State originally and always belonged to the States, was never surrendered by the States to Congress, and hence that Congress has, and never had any right to legislate on any subject whatever, which legitimately and properly came within the police powers of the States.

Mr. Chief Justice Fuller, *ante*, lays down the correct doctrine as follows: "The power of the States to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, *is a power originally and always belonging to the States, not surrendered by them to the general Government, nor directly restrained by the Constitution of the United States,* AND IS ES-

SENTIALLY EXCLUSIVE."

Mr. Justices Harland, Brown and Gray in delivering their opinion in Rhodes vs. Iowa, *ante,* lay down the correct doctrine in the following language: "The regulation of the manufacture, sale and use of intoxicating liquors has always been recognized as the subject **peculiarly appertaining to the police power of the several States respectively.**"

Mr. Cooley in Const. Lim., 707, 708, lays down the correct doctrine as follows;

In the American Constitutional System, the power to establish the ordinary regulations of police has been left with the original States, and it cannot be taken from them, **either wholly or in part and exercised under legislation of the Congress.** Neither can the national government, through any of its departments or offices, assume any supervision of the police regulations of the States. All that the Federal authority can do, is to see that the States do not, under cover of this power, invade the sphere of national sovereignty," etc.

The Supreme Court of the Territory of Dakota, in Territory vs. O'Connor 5 Dak. 415, lays down the correct doctrine as follows: "It would seem to be conceded that the Legislature has power to authorize or allow municipal government by charter to exercise all the ordinary police powers, including the regulation and prohibition of the sale of intoxicating liquors."

Mr. Justice Fuller in rendering his concurring opinion in this very case (104 N. W.) 542 lays down the correct doctrine as follows: "As self-preservation is a law of nature predominant in every organized community, the inherent right to guard against the introduction and traffic in commodities which endanger the health and corrupt the morals of our citizens was **never surrendered to the general government.**"

In addition to these authorities, we have conclusively shown from the history of the formation of the Federal Constitution and articles of Confederation, that the States in forming the Federal Constitution, never intended to dele-

gate the congress any authority whatever over the police affairs of the several States or any thereof. We have also shown that the great State of New York, at the time of ratifying the Federal Constitution, reserved to itself the right to withdraw from the Union, provided this police power and other powers were not reserved to the States.

From all of which, we think it has been conclusively shown that Congress has, and never had, any right whatever to legislate upon the legitimate police affairs of any of the several States. If this important position be true, then it follows, beyond successful contradiction, that in the passage of the Inter-State Commerce Act, Congress had no authority whatever to interfere in any manner with the legitimate police affairs of the States. And it further follows that the Wilson Act, recited, confers no power whatever upon the States over legitimate affairs; for Congress had no power to do so. All the Wilson Act could do in the premises, was to recognize that the power in question was inherent in the several States, and that Congress, in the passage of the Inter-State Commerce Act, never intended to interfere with the traffic in intoxicating liquors in the several States of the Union in any manner whatever.

Bear in mind always, that this constitutes the true reason upon which is founded all the decisions of this Honorable Court upon the traffic in intoxicating liquors within the several States. Bear in mind always that these decisions, should not be founded upon the Wilson Act, but upon the true and broad ground that Congress never had any authority whatever to legislate upon this matter.

Bear in mind always, that we do not insist that the States can arrogate to themselves the right finally to decide what comes within their police powers; for this might jeopardize our whole system of government. Bear in mind that we always concede it belongs legitimately for this Honorable Court to determine the true lines where the police power of the States begins, and likewise where it ends. But when this Honorable Court has once established the line of de-

markation, Congress itself must be absolutely governed and controlled thereby to the same extent as the States. This honorable Court can rightfully say to each: "Thus far shalt thou go; but no farther."

This Court happily defined the line of the police power of the States with reference to intoxicating liquors. It has done this from the beginning. It has done this in the License Cases heretofore reproduced. It has done likewise in Wilkerson vs. Rahrer, already quoted at some length. And it has also done likewise in Pabst Brewing Co. vs. Crenshaw, already quoted.

We insist that this constitutes a final determination of this important question; and we have full faith that the pathway blazed through the forest for more than a century of time, will not be abandoned now.

In addition to the foregoing decisions of this honorable Court upon this important point, I will cite a few only of the numerous decisions of our State Courts of last resort which hold to the same doctrine and support the same position which this Court has always taken upon this subject.

First among the decisions of the various State Courts of last resort, I will here reproduce a sufficient portion of the opinions of the concurring Justices of the Supreme Court of the State of South Dakota, whereby they affirmed the conviction of the plaintiff in error in this very case. In delivering his opinion in this cause, Mr. Chief Justice Corson says:

"I fully concur in the views expressed by Mr. Justice Haney as to the constitutionality of the License law of this State. * * * In my judgment, when the conclusion was reached that the law is constitutional, it logically followed that the judgment of the Court below is correct and should be affirmed, as the defendant was clearly doing business in violation of the law of this State without having first paid the license required by the law. Section 2834, Rev. Pol. Code, relating to the sale of intoxicating liquors, provides: 'In all townships, precincts, towns and cities of the State, there shall be annually paid the following license, * * upon the business of selling or offering for sale any spirituous, vinous, malt, brewed or fermented or other intoxicating liquors at retail, * * * 400.00 per annum; upon the

business of selling or offering for sale any of the above mentioned liquors at retail by any traveling salesman who solicits orders by the jug or bottle in lots of less than five gallons, $200.00 per annum.' Section 2836 provides: 'Every person engaged or intending to engage in any business mentioned in section 2834, and requiring the payment of any license mentioned in said section shall * * * pay to the the County Treasurer in advance the license required by section 2834 for such business for a year commencing on the first day of July and ending on the 30th day of June next thereafter.' Section 2838 provides 'If any person or persons shall engage or be engaged in any business reqniring the payment of a license under section 2834 without having paid in full the license required by this article, * * * shall be punished by a fine of not less than $50.00 nor more than $500.00, and cost of prosecution, or by imprisonment in the county jail not less than ten days nor more than thirty days, or by both such fine and imprisonment in the discretion of the Court.'

"It will be observed by the statement of facts in this case that the defendant was a traveling salesman employed by Louis L. Metzger & Co., and that on the 10th day of February, 1904, he was engaged as traveling salesman in soliciting orders for said company for the sale of intoxicating liquors in quantities less than five gallons from citizens and residents of and within the County of Potter, and that he had not paid any license nor procured a permit to sell the same as required by the provisions of section 2834. * * It appears from the statement of facts that the defendant was doing precisely what he was prohibited from doing without paying a license and obtaining a permit therefor.

"Great stress is placed upon the fact that the firm for which the defendant (plaintiff in error) was soliciting orders was required to pass upon the orders and, if accepted, the intoxicating liquors were delivered through a transportation company in St. Paul; and that that constituted a delivery to the parties who had given the orders outside of the State; and that, for this reason, the defendant had not violated any of the provisions of the law, of this State. This construction of the law it seems to me, is entirely unwarranted by the language of its provisions, the evident intention of the law making power, and in conflict with decisions of the Court passing upon similar questions.

"When, as it appears by the statement of facts, the defendant was engaged in the business of offering for sale and soliciting orders for intoxicating liquors, without a payment of the license fee and obtaining a permit to engage in such

business, **he was engaged in the business prohibited by the law-making power.** In the view I take of the case, it is immaterial as to whether the transaction is to be regarded as a sale of liquor, or as offering it for sale, or soliciting orders for the purchase of the same, as the doing of either act constitutes a violation of the provision of the statute. Soliciting orders for the purchase of liquor, constituted a part of the transaction in the sale of the same; and this was the view taken by the Circuit Court of the United States for the district of New Hampshire, in Lang et al vs. Lynch, 38 Fed. Rep. 489, 4 L. R. A., 831, in which the Court held: 'Orders taken for the sale and delivery of liquors in violation of the law of the State, are a part of the contract of the sale, and as such render the entire transaction void, and no recovery thereon can be had.' The learned Circuit Judge in his opinion says: 'I am of the opinion, therefore, that the taking of the order by the agent of the plaintiff was a part of the contract of sale, so far as to forbid a right of recovery upon the contract, and that the statute of New Hampshire inflicting a penalty for the offence, prohibits the right of recovery, for the price of the liquor sold.' It is true this was an action to recover the value of the liquors sold and delivered in another State; but the Court seems to take the view,—and I think very properly,—that taking an order by the agent was a part of the sale.

In this case, it is not necessary to go so far as that Court went, as our statute provides a penalty for offering for sale or soliciting orders. In that case the learned Court held that the act of the State of Connecticut of 1882 forbid all persons without a license therefor to sell intoxicating liquors by sample, or by soliciting or procuring orders, and hold that a contract for sale made in the State of Connecticut by a traveling agent of a firm in another State of liquors to be delivered in such other State, is a violation of the statute. It appears in the statement of facts in that case, as in this, that a traveling salesman representing a firm in the city of New York was engaged in the State of Connecticut in soliciting orders for intoxicating liquors for his firm; and that such orders were transmitted to the firm in New York City and, if approved by the firm, the liquors ordered were delivered to a carrier in New York City for the party ordering the same. The Court in the case in its opinion says:

"'The defendant was convicted, and appealed to this Court. His grievance, that he was convicted of an unlawful sale, while, as he contends, he effected no sale within the meaning of the statute in this State. He said that he only solicited and obtained an order in this State, and that the

sale was completed by a delivery of the liquors by his employers to the purchaser in the State of New York. The statutes of 1882, c. 107, pt. 6, §1 (Acts 1882 p. 185), provides that 'any person who, without a license therefor, shall by sample, by soliciting or procuring orders, or otherwise, sell any spirituous liquors, shall be fined for the first offence not more than $50.00' etc. * * * 'The question is, what did the Legislature mean by selling by sample, or by soliciting or procuring orders? A majority of the Court think that it intended to prohibit just such a sale as was made in this case. If the statute is to be so construed as to limit its operation to sales completed by delivery in this State, of course a vast majority of sales by soliciting orders will not be embraced in the statute. We think that the legislature, taking notice of the fact that wholesale dealers in New York and elsewhere out of the State generally, sell their wares through agents going from place to place soliciting and procuring orders, intended to prohibit such sales; otherwise the facilities for making such sales are so great, extending to every town and hamlet in the State that the efficiency of the license law would be materially impaired. Dealers in neighboring States without license and without restrictions, could sell and cause to be delivered in any and all parts of the States liquors to any extent. Hence the legislature was careful to guard against such a result by prohibiting, as it does in the 11th section, all sales without a license and all sales in a no-license town.' And the court in concluding its opinion, says: 'The claim that the legislature intended only such sales as should be consummated by a delivery in this State, cannot be allowed. It is a matter of common knowledge that sales effected by drummers are usually, if not always, consummated by delivery at the vendors place of business to a common carrier; and while such delivery, for all civil purposes completes the sale made by the drummer, vests the title in the purchaser, and gives the seller a right to the purchase money, yet for all police purposes it is competent for the legislature to say that the acts done by the drummers shall of themselves constitute a sale, and therefore an offense. And we think the Legislature intended so to say, and to make all such acts an offense, whether the delivery was in or out of the State. By doing so the word 'sell' is used in the same sense in which it is generally used by business men in relation to this sub-

ject-matter. In common language, a drummer sells goods. He sells by sample. He sells by soliciting and procuring orders. The dealers sell by drummers as their agents. Now, if the statute does not reach all such cases, then it falls short of reaching the evil aimed at and **the intended remedy is a failure.'**

"That Court, in its opinion, evidently disregarded the claim made by the defendant that the order is taken by him were required to be passed upon and accepted by the firm in New York City before a sale could be made, and the claim that the Inter-State Commerce Law was violated, as unworthy of notice, as it does not refer to them in the majority opinion.

"It will be observed that the provisions of this section in this State are broader and more comprehensive than the provision of the statute of Connecticut, and as they include not only the **sale** of intoxicating liquors, but the **offering for sale and the solciting of orders.**

"Clearly, the defendant in the case at bar (the plaintiff in error in this Court) was engaged in the business in Potter County, not only of selling, but offering for sale, and soliciting orders for the sale of intoxicating liquors. The claim that the defendant had not committed the offense under the statute, because the order had to be approved at St. Paul, and that the delivery was made there to the purchaser, and not in South Dakota, is clearly untenable. Such a construction is entirely unwarranted by the law itself or by the evident intention of the law-making power. In my judgment, it is entirely immaterial whether the liquors were delivered in this State, or delivered at all. The offense was complete under the statute, when the defendant **solicited** the order, or **offered** the liquor for sale.

* * * "The Legislature not only prohibited the **sale** of intoxicating liquors, but the **offering** for sale, or the **soliciting** of orders for the purchase of, the same by any person, unless he had paid such license and procured the permit. We may assume that the Legislature knew all or nearly all traveling salesmen take orders subject to the approval of the houses represented by them, and that the delivery of the goods sold is usually made in other States. If our Legislature simply meant to prohibit the offering for sale or soliciting of orders in cases where the goods were actually delivered by the agent in this State, it failed to

accomplish anything beneficial by the enactment of the law, as, of course, it was known to them, and it is known to us, that few, if any, such sales would be made by agents in this State, but there would be, as in the case at bar, the form of submitting the order to the firm outside of the State, and that such firm would accept the order and deliver the liquor outside of our State.

"I understand that the power of the Legislature to require the payment of such license before engaging in the business in this State of soliciting orders or offering for sale intoxicating liquors, will be affirmed by the undivided Court in holding the law constitutional.

"In my opinion, the judgment of the Court below should be affirmed."

In delivering his opinion in the case at bar. when before the Supreme Court of the State of South Dakota, Mr. Justice Fuller says:

"As self-preservation is a law of nature. predominant in every organized community, the inherent right to guard against the introduction and traffic in commodities which endanger the health and corrupt the morals of our citizens, was never surrendered to the general government; and the statute confessedly violated by the accused, in no manner interferes with any of the laws of the United States. From the opinion of Chief Justice Taney in the License Cases, 5 How. 504, 12 L. ed. 256, I quote as follows: 'These laws may, indeed, discourage imports and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and permit a sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of the citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculates to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.'

"Assuming that our police system of regulating the liquor traffic by means of high license, has a tendency to diminish Inter-State shipments, that result would constitute no infringement of the constitutional guarantee of commercial freedom among the States. Independently of any ques-

tion of citizenship, and without the slightest discrimination, the solicitor of orders, as a person engaged in the business of offering intoxicating liquors for sale must pay the license, or suffer the penalty provided by the statute; but no penalty, restriction or burden, is imposed upon a non-resident engaged in Inter-State Commerce.

"And to the validity of the law under consideration, I concur with both my associates, and with Presiding Judge Corson, agree in the conclusion that the plaintiff in error was lawfully convicted, consequently the determination of all questions of law and fact at the trial below is sustained by the majority of this Court, and the judgment of conviction is therefore affirmed."

State vs. Delamater, (S. D.) 104 N. W. 537, et seq.

Bear in mind that the foregoing constitutes the decision of the Supreme Court of the State of South Dakota in this cause, wherein that Court affirmed the conviction of the plaintiff in error in the trial Court. This is certainly conclusive evidence of the constitutionality of the statute under which the plaintiff in error was convicted, so far as the constitution of the State of South Dakota is concerned. This same question, that the said statute of South Dakota was in violation of section 8 of article 1 of the Federal Constitution, was raised and urged and insisted upon in that Court: but as we have just seen, that Court upheld the statute in question and declared that it conflicts in no manner whatever with the commerce clause of the Federal Constitution.

The Supreme Court of Alabama, in their opinion filed February 7, 1905, lays down the true doctrine, in part, in the following words:

"It belongs to the legislative department, in the exercise of the **police power** of the State, to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety, subject to the power of the Courts to adjudge whether any particular law is an invasion of the right secured by the constitution. We think it is well settled that the legislature, in dealing with the sale of intoxicating liquors, is fulfilling a public duty; that it is striving to promote the health, safety and morals of the community."

Equitable L. & S. Co. vs. Town of Edwardsville (Ala.) 38 S. W. R., 1016.

In a recent case, the Supreme Court of the State of

Indiana made use, in part, of the following language:

"The power to regulate the liquor traffic is found in the **police power** of the State; and it should be remembered, in considering all statutes on this subject, that no one possesses an inalianable or constitutional right to keep a saloon for the sale of intoxicating liquors. 'To sell intoxicating liquors at retail is not a natural right to pursue an ordinary calling.'—Black, Intox. Liq., §48; Boomershine vs. Uline (1902) 159 Ind., 500, 503; State vs. Venhardt (1896) 145 Ind., 439, 462, 33 L. R. A., 313; Sherlock vs. Stuart (1893) 96 Mich., 193, 55 N. W. Rep. 845, 21 L. R. A., 580; Cooley Const. Lim. (7 ed) 845, 851.

"Neither is the right to sell intoxicating liquors one of the privileges and immunities of citizens of the United States which the 14th amendment of the constitution of the United States forbids the States to abridge.—Bartmeyer vs. Iowa (1873) 18 Wall (U. S.) 129, 21 U. S., (L. ed) 929; Mugler vs. Kansas (1887) 123 U. S., 623, 8 U. S. Sup. Ct. Rep. 273; Crowley vs. Christensen (1890) 137 U. S. 86; Giozza vs. Tiernan (1893) 148 U. S., 657; Farmville vs. Walker (1903) 101 Va., 323, 43 S. E., 588; Danville vs. Hatcher (1903) 101 Va., 523, 526, 531; Cooley, Const. Lim., (7 ed.) 854–851.

"In the case of Giozza vs. Tiernan, **supra,** involving the constitutionality of the laws regulating the sale of liquors in Texas, Mr. Chief Justice Fuller says at page 661: 'But it is contended that the act conflicts with the provisions of the 14th amendment that 'no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'

"The privileges and immunities of the citizens of the United States, are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the constitution of the United States; and the right to sell intoxicating liquors is not one of the rights growing out of the said citizenship. Bartemeyer vs. Iowa (1873) 18 Wall., (U. S., 129.

"The fourteenth amendment does not take from the States their powers of police that were **reserved at the time the original constitution was adopted.** Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the States to pro-

tect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order.

"In Crowley vs. Christensen, **supra,** at page 91, the Supreme Court of the United States, by Mr. Justice Field says: 'The sale of such liquors in this way has therefore been, at all times, by the Courts of every State, considered as the proper subject of legislative regulation. * * * It is a question of public expediency and public morality, and not of Federal law. The police power of the States is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in the citizen thus to sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or a citizen of the United States. * * * The manner and extent of the regulation, rests in the discretion of the government authority. * * * But this is a matter which does not affect the authority of the State, **nor is it one which can be brought under the cognizance of the Courts of the United States.**

"These principles have been sustained by the Supreme Court of the United States in a long line of decisions, rendered both before and after the adoption of the 14th amendment.—Bartemeyer vs. Iowa (1873) 18 Wall. (U. S) 129; Boston Beer Co. vs. Massachusetts (1877) 97 U. S. 25; Mugler, vs. Kansas, (1887) 123 U. S., 623; Kidd vs. Pearson, (1888) 128 U. S., 1; McGaney vs. Virginia (1890) 135 U. S., 662; Crowley vs. Christensen, (1890) 137 U. S., 86; Giozza vs Tiernan (1893) 148 U. S., 637."

In a very recent case the Supreme Court of the State of Tennessee, relative to the point under consideration, through Mr. Chief Justice Beard, lays down the doctrine as follows:

"With regard to the retailing of intoxicants, there has never been a question as to the rights of the several States to control the subject. The long line of cases found in the reports of the Supreme Court of the United States agree in affirming the general proposition that the regulation of the manufacture and the sale of intoxicating liquors is peculiarly under the control of the States, and within their **police power which has not been surrendered to the Government.**—License Cases, 5th How. (U. S.) 504; Bartemeyer vs. Iowa 18 Wall., (U. S.) 129; Boston Beer Co. vs. Massachusetts 97 (U. S.,) 25; Foster vs. Kansas 112 (U. S.,) 201; Mugler vs. Kansas, 123 (U. S.) 623; Kidd

vs. Pearson, 128 (U. S.,) 623, Eilenbecker vs. District Ct., 134 (U. S.,) 31.

"In the earliest and most celebrated of these cases reported under the title of the License Cases, there was involved a question of the constitutionality of certain laws passed by the legislatures of Massachusetts, New Hampshire, and Rhode Island, restricting the sale in these different States. * * * The Justices of the Supreme Court of the United States agreed in maintaining the constitutionality of this statute, though they rested their conclusion on different grounds."

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In Commonwealth vs. Gagne, The Supreme Court of Massachusetts, in part, uses the following language:

"The police power possessed by the States to pass those regulations necessary to preserve the health, morality, order and peace among their citizens, if not as easily defined, is as absolute as the right of the national government to regulate commerce with foreign nations or among the several States. The laws passed in the exercise of this power, should receive such an interpretation, notwithstanding the generality of the terms in which they may be expressed, as will confine them in their application to those subjects with which they may lawfully deal."

We have thus endeavored to show.—and we think, successfully,—that the holding of this Honorable Court are abundantly sustained by the Courts of last resort throughout the States; and that, while Justices of this Honorable Court have not always concurred in perfect harmony with the **reasons** for their holdings, yet they have always agreed in the ultimate result. And if this Honorable Court adheres to its holdings throughout the long period of nearly a century of time, we shall expect that, in the case at bar, the decision of the Supreme Court of the State of South Dakota in the case will be sustained and upheld.

THE SOUTH DAKOTA STATUTE.

"AN ACT to provide for the Licensing, Restriction and Regulation of the Business of the Manufacture and Sale of Spirituous and Intoxicating Liquors."—Session Laws, South

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"§2834.—In all townships, precincts, towns and citi
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and costs of prosecution, or by imprisonment in the coun
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§2834-2838, Revised Political Code, South Dakota, 19

The plaintiff in error was arrested, tried, convicted a
sentenced for a violation of these sections of our statu
which was enacted in full persuance of the rightful pow
of the Legislature of this State to control its own poli
affairs in its own way, so as best to promote the welfa
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Bear in mind that this Statute makes no discriminati
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Dakota, 1897, Chap. 72.

"§2834.—In all townships, precincts, towns and cities of this State there shall be annually paid the following license upon the business of selling or keeping for sale by all persons whose business in whole or in part consists in selling or keeping for sale in this State distilled, brewed or malt liquors, or mixed liquors as follows: * * * Upon the business of selling or offering for sale any spirituous, vinous, malt, brewed, fermented or other intoxicating liquors at retail, or any mixture or compound, except proprietary patent medicines which in part consist of intoxicating liquors, Four Hundred Dollars per Annum. Upon the business of selling or offering for sale any of the above mentioned liquors at retail by any traveling salesman who solicits orders by the jug or bottle in lots of less than five gallons, Two Hundred Dollars per Annum. Said license to be paid in each county in which said traveling salesman does business in accordance with the provisions of §2836."

§2838.—"If any person or persons shall engage or be engaged in any business requiring the payment of license under section 2834, without having paid in full the license required by the article, * * * or shall in any manner violate any of the provisions of this article, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof, if there is no specified penalty provided therefor by this article, shall be punished by a fine of not less than Fifty Dollars nor more than Five Hundred Dollars, and costs of prosecution, or by imprisonment in the county jail not less than ten days nor more than thirty days or by both such fine and imprisonment, in the discretion of the Court."

§2834–2838, Revised Political Code, South Dakota, 1903.

The plaintiff in error was arrested, tried, convicted and sentenced for a violation of these sections of our statute, which was enacted in full persuance of the rightful power of the Legislature of this State to control its own police affairs in its own way, so as best to promote the welfare, prosperity, safety and morals of our people. That the Legislature of this State possesses full power thus to regulate its own proper police affairs, has been shown conclusively by the authorities quoted and cited.

Bear in mind that this Statute makes no discrimination whatever between its own citizens and citizens of other

States. It treats everybody precisely alike. The citizens of South Dakota are restrained in precisely the same way as the citizens of Minnesota. The dealers in intoxicating liquors in South Dakota are treated precisely like the dealers in the State of Minnesota. The dealers in St. Paul in the State of Minnesota, and the dealers in Sioux Falls, in the State of South Dakota, are treated precisely alike. There is no hint of any favoritism in favor of the citizens of South Dakota or any other State in the Union.

For the purpose of informing this Court more fully in regard to the holdings of the Supreme Court of the Territory of Dakota and the State of South Dakota upon the traffic in intoxicating liquors, I quote from the opinion of Mr. Chief Justice Tripp, (late President of the Samoan Commission), whose opinions are excelled by none, wherein he says:

"The Plaintiff in this proceeding seeks to attack the validity of Chap. 70 of the laws of the Legislative Assembly, passed at the 17th Session, 1887, entitled 'An Act to prohibit the Sale of Intoxicating Liquors by local option. * *

"Police powers are among the more common powers exercised by the sovereign States."

"This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim **'sic utero tuo ut alienum non leidas,'** which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others. * * * There is also the general police power of the State by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right in the Legislature to do which, no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned." Thorpe vs. Railway Co., 27 Vt. 149. The power to prohibit the sale of intoxicating liquors not only comes within these definitions, but it has been frequently so held by the Courts. Mr. Cooley says: 'In the American constitutional system the power to establish the ordinary regulations of police **has been left with the individ-**

ual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation or Congress. Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the States. All that the federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the constitution has confided to the nation, or deprive any citizen of rights guaranteed by the Federal Constitution; Cooley Const. Lim. 708, 709. The very theory upon which our system of government is based, of allowing each locality to govern its municipal affairs in its own way, and that the Congress shall legislate upon affairs pertaining to the good of the whole people, made it necessary that the people of the territories should have a local government; and its matters of police were among the first and necessary powers committed to such local government.

If, then, the power of local option pertains to the police, it is a rightful subject of legislation, and the power to make such law was given by the Organic Act: but, irrespective of such logical conclusion, to which we must arrive, it would be a bold and backward step for the Court to say, in the face of modern legislation upheld by the highest courts of the States and the Nation, that local option is not a 'rightful subject of legislation.'" * *

Territory vs. O'Connor, (1889) 5 Dak. 397.

Bear in mind that the foregoing decision was rendered more than two years after the approval of the Inter-State Commerce Act, and with a full knowledge of the provisions thereof by Mr. Chief Justice Tripp, who wrote the foregoing opinion. And I will call the attention of this Court to the undoubted fact that the legal lore embraced in the foregoing opinion, more than anything beside, led to the appointment of Mr. Tripp at the head of the Samoan Commission.

More than two years subsequent to the date of the foregoing decision, (the Territory of Dakota, in the interim, having been divided and admitted into the Union as two States) the Supreme Court of the State of South Dakota makes use of the following language:

"Legislation similar to ours now under consideration

has also been repeatedly held by the Supreme Court of the United States to be unobjectionable to the fourteenth amendment to the Constitution of the United States. In the case of Bartemeyer vs. Iowa, 18 Wall. 129' it was said that prior to the adoption of the fourteenth amendment, State enactments regulating liquors raised no question under the Constitution of the United States; and that such legislation was left to the discretion of the respective States, subject to no other limitations than those imposed by their own constitutions, or by the general principles supposed to limit all legislative power. Referring to the contention that the right to sell intoxicating liquors was secured by the fourteenth amendment, the Court said: 'So far as such right exists, it is not one of the rights growing out of citizenship of the United States.' In Beer Co. vs. Massachusetts, 97 U .S. 55, the Court says: 'As a measure of police regulations, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States.' In Foster vs. Kansas, 113 U. S.. 201-206, 5 Sup. Cy. Rep. 8, 68, the Court said that the question as to the constitutional power of a State to prohibit the manufacture and sale of intoxicating liquors was no longer an open one in that Court (Supreme Court of the United States). These cases rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and in so doing to protect the health, morals and safety of their people by regulations that do not interfere with the execution of the powers of the general government."

State vs. Brennan, (1899) 2 S. D., 384.

State vs. Beucklen, 10 S. D., 156.

Bear in mind that the foregoing decision was rendered more than four years subsequent to the approval of the Inter-State Commerce Act.

THE ASSIGNMENTS OF ERROR.

The six Assignments of Error, on behalf of the plaintiff in error, have not been taken up and discussed separately, for the reason that there is practically but one question raised by them all.

It was conceded by the plaintiff in error in the trial Court in substance that the plaintiff was guilty of the offense charged in the information, provided only that the statute

in question was not in violation of §8 of article 1 of the Federal Constitution.

Hence, there being but one question at issue, it has been thought unnecessary to take up each assignment of error separately; but that it were better to discuss the single question presented by all the assignments of error.

Strangely enough, under rule 21 of this Court, the parties to actions are not required to serve their Brief on opposing counsel, and are required to file them with the Clerk of this Court only six days before the case is to be called for argument; hence the Defendant in Error in this cause is without any information whatever relative to the authoritiy cited and relied upon by the plaintiff in error, in this Court, at the time of the preparation of this Brief.

Just why such an unreasonable rule, relative to the service of Briefs, should prevail in this Court, is entirely beyond my comprehension. But inasmuch as it *is* the rule, it must be presumed to be founded upon some reason; and attorneys must govern themselves accordingly as best they can.

It may thus be seen that, by reason of having no knowledge of the authorities cited and relied upon in this cause in this Court by the plaintiff in error, the defendant in error is thereby limited to an examination of the authorities cited and relied upon in the trial Court, and in the Supreme Court of the State of South Dakota in support of his assignments of error; and hence we will now proceed to a brief examination thereof.

On page 7 of the Brief for Plaintiff in Error, used on the hearing of this cause in the Supreme Court of South Dakota, —now on file in this Court,—Counsel for plaintiff in error says:

"The leading case, and one that has been followed by hundreds of subsequent cases, is the case of Robins vs. Shelby County Taxing District, where the Court says: 'Inter-State Commerce cannot be taxed at all, even though the same amount of tax should be levied on domestic commerce or that which is carried on solely within the State.'—Robins vs. Shelby Taxing District, 120 U. S., 489."

In reply to this, all I wish to say is, nobody claims, that Inter-State Commerce can be taxed by a State. The pen-

alty provided in the statute in question in the case at bar, does not pretend to impose a tax upon Inter-State Commerce. The Plaitinff in Error was not convicted in the trial Court for the violation of any statute imposing a tax upon the Inter-State Commerce. He was convicted of the crime of soliciting orders for the sale of intoxicating liquors at and within the County of Potter and State of South Dakota. He was carrying on this business in the County of Potter and State of South Dakota. He was arrested by the Sheriff of said County of Potter at and within the said County of Potter and State of South Dakota. So far as the evidence in this case shows, he was a citizen of the State of South Dakota.

The statute in question was passed,—not to regulate Inter-State Commerce,—but to regulate and control the police affairs of the State of South Dakota relative to intoxicating liquors. This statute, of course, is of no effect outside of the State of South Dakota. It was not intended to have any such effect. It imposed a penalty on whom? On those violating the statute at and within the State of South Dakota. It imposed no penalty whatever on Lewis L. Metzger & Co., of the City of St. Paul and the State of Minnesota. It did not purport to impose any such penalty. The statute was passed exclusively to control the citizens of the State of South Dakota in the transaction of the traffic in intoxicating liquors at and within the State, and likewise all others engaged in the same business at and within the State of South Dakota. It was entirely local in its operation. It has nothing whatever to do with Inter-State Commerce in any manner, shape or form.

Hence, while the case cited undoubtedly lays down the law correctly which was involved in that case, yet it has nothing whatever to do with the case at bar.

Immediately thereafter Counsel for Plaintiff in Error cite a portion of the opinion of the Honorable Chief Justice of this Court, in Lyng vs. the People, 135 U. S., 161, wherein it is said that no State has the right to lay a tax upon Inter-State Commerce. Just why the Counsel should deem it necessary to cite authorities upon this point, is cer-

tainly beyond ordinary comprehension; for no one claims that a State has any such right.

Counsel for plaintiff in error, on page 9 of said Brief, makes use of the following language:

"It would seem that this matter should be ruled and determined by the decision in State vs. Rankin, decided by this Court (Sup. Ct. S. D.) on August 31, 1898, the syllabus of which is as follows: 'The laws of 1887, page 102, imposing a license fee on solicitors taking orders for mercantile establishments violates the Inter-State Commerce clause of the Constitution of the United States as against the salesmen of a house of any other State selling *clothing* by sample to be made from measurements taken by the salesman, and this, although there is no discrimination between resident and nonresident establishments.'"

In reply to the foregoing, I wish to call the attention of this Court to the fact that the opinion in this South Dakota case just cited, was handed down by Mr. Justice Fuller, who wrote one of the concurring opinions in the case at bar when before that Court, wherein the plaintiff in error was held to have been properly convicted of the offense charged in the information in the case at bar.

We fully concur with that opinion. It lays down the sound doctrine beyond all question. Nobody disputes it. But bear in mind always that selling *clothing* is one thing, and selling *intoxicating liquors,* without restrictions of any kind, which corrupt the morals, destroy the health, and ruin the prosperity of untold thousands of families, is another matter entirely. And Mr. Justice Fuller, in delivering his opinions in the two cases referred to, undoubtedly understood and realized the broad distinction between the two cases. He states the difference between them in as strong terms as our language affords.

The Statute in question is a License Law and not a Tax or Revenue Law.

In reviewing the authorities presented by counsel for plaintiff in error in the Supreme Court of South Dakota, it becomes necessary to state that the statute in question is a License Law, and is neither a Tax or Revenue Law; and secondly, that if the law in question contains any of the

characteristics of a Tax Law, it is simply an occupation tax and not a tax upon the goods, and hence is in no sense a tax upon Inter-State Commerce. Thirdly, that without regard to whether it is a License Law, a Tax Law, or an occupation Tax, it is conclusively a *police regulation,* and as such, is wholly within the powers of the State. Fourthly, that if the States had no power, prior to August 8, 1890, to pass laws regulating traffic in intoxicating liquors, as a police regulation, the Act of Congress of August 8, 1890, known as the Wilson Act, gave the States that power, not only to regulate the sale of the goods after arrival within the State, but to pass such laws as might affect the preliminary steps of the sale, or the incidents of the sale as well as the consummated sale itself. Fifthly, there being no question that, under the police powers of the State, considered either as a reserve or a granted power by said Act, the State had and has power to pass laws either forbidding or regulating the sale of intoxicating liquors; and hence it necessarily has power to regulate the sale thereof. And if the State had the right to license the sale and prohibit the engaging in the business of selling without the payment of the license, the law would be of no value whatever, unless that power included the power to regulate the preliminary steps or incidents of such sale.

We respectfully contend that, if we show these propositions or any of them to be the correct law, then it becomes an established fact that the statute under which the plaintiff in error was convicted is clearly within the power of the State Legislature, and hence that the same is constitutional. The first proof of the nature of the Act and of its purposes is the title, which we have hereinbefore reproduced. A consideration of the entire Act, plainly shows it is nothing more nor less than a License upon the business, divided into different parts into which such traffic is usually carried on, viz: Wholesale, retail, and selling by soliciting orders; purely a license law in its parts. From the very nature of the Act, it is plainly to be seen it was not intended for the purpose of producing revenue for the State, but on the contrary, it shows nothing but an intent to regulate, control and restrict a business deemed by the constitution and the Legislature,

of the State of South Dakota as inimical to the best interest, welfare, health and morals of the people.

Such laws are almost universally held to be license laws, and not tax laws, regardless of the amount of revenue derived therefrom. Upon this proposition, as to the nature of the Act in question, we submit the following:

"According to the great weight of authority, the power inherent in the Legislature to regulate the exercise of privileges and of following pursuits and occupations, does not fall properly within the Taxing powers, but within its police power. License fees exacted by the general laws regulating the traffic in intoxicating liquors, are not taxes within the meaning of any constitutional provision relating to taxation, but are nothing more nor less than the price paid for the privilege of doing a thing, the doing of which, the legislature has a right to prohibit altogether. These laws are regarded as *police regulations* enacted with a view of regulating and restricting a business regarded as evil in its effects upon society. It does not follow that because the license is large, or because it may become a part of the public revenue, it is therefore a tax."

This position is abundantly sustained by the following authorities:

17th Ency. of Law, 2d ed. 223, citing.
Straub vs. Gordon, 27 Ark., 625.
Ex parte Marshall, 64 Ala., 267.
Territory vs. Connell, (Ariz.) 16 Pac., 209.
Henry vs. State, 26 Ark., 523.
State vs. Doherty, 2 Idaho, 1105.
E. St. Louis vs. Vehrung, 46 Ill., 392.
U. S. Distilling Co. vs. Chicago, 112 Ill., 19.
Thomasson vs. State, 15 Ind., 449.
Com. vs. Fowler, 96 Ky., 166.
Keller vs. State, 11 Md., 525.
Youngblood vs. Sexton, 32 Mich., 406.
State vs. Klein, 22 Minn., 328.
State vs. Hudson, 78 Mo., 302.
Pleuler vs. State, 11 Neb,, 569.
People vs. Murray, 4 N. Y., App. Div., 185.
Senior vs. Ratterman, 44 Ohio St., 661.
Anderson vs. Brewster, 44 Ohio St., 576.
Adler vs. Whitbeck, 44 Ohio St., 539.

State vs. Hipp, 38 Ohio St., 225.

"Licenses imposed on the Liquor traffic and other occupations which call for regulations by the State, do not cease to be licenses proper, even though they yield a revenue in access of that required for the purpose of the regulation."

Encyc. L. 2nd ed., 774;

City of Indianapolis vs. Bieler, 36 N. E., 857;
East St. Louis vs. School Trustees, 102 Ill., 489.

"Occupation taxes, are not property taxes, and therefore are not subject to the restrictions imposed upon property taxation."

United States:

Savings Soc. vs' Coite, 6 Wall. (U. S.) 594;
Hamilton Mfg. Co. vs. Massachusetts, 6 Wall. (U. S.) 632;
Provident Inst. vs. Massachusetts, 6 Wall. (U. S.) 611;
Pullman Southern Car Co. vs. Nolan, 22 Fed. Rep., 278.

Alabama:

Goldsmith vs. Huntsville, 120 Ala., 182;
Capital City Water Co. vs. Montgomery County, 117 Ala., 303.

Georgia:

Burch vs. Savannah, 42 Ga., 596;
Rome vs. McWilliams. 52 Ga., 251;
Decker vs. McGowan, 59 Ga., 805;
Johnston vs. Macon, 62 Ga., 645;
Mutual Reserve Fund L. Assoc. vs. Augusta, 109 Ga., 73.

Iowa:

Scottish Union, etc., Ins. Co. vs. Herriott, 109 Iowa 606, 77 Am. St. Rep. 548.

Kansas:

In re Martin, 62 Kan., 638.

Kentucky:

Louisville City R. Co. vs. Louisville, 4 Bush (Ky.) 478.

Louisiana:

Blanks vs. Bastrop, 18 La. Ann., 534;
New Orleans vs. Louisiana Sav. Bank, etc., Co., 31 La. Ann., 637;
Wintz vs. Girardey, 31 La. Ann., 381;
New Orleans vs. Metropolitan Loan Sav. etc., Bank, 31 La. Ann. 310;
Walters vs. Duke, 31 La. Ann., 668;
State vs. Citizens' Bank, 52 La. Ann., 1086;
Municipality No. Two vs. Dubois, 10 La. Ann., 56.

Maine:

State vs. Western Union Tel. Co. 73 Me., 518.

Massachusetts:

Com. vs. Lancaster Sav. Bank, 123 Mass., 493.

Mississippi:

Orton vs. Brown, 35 Miss., 426.

Montana:

State vs. Camp Sing, 18 Mont. 128, 56 Am. St. Rep., 551.

Nevada:

Ex. p. Cohn, 13 Nev., 424.

Ohio:

State vs. Adams Express Co., 3 Ohio Dec., 326;
Baker vs. Cincinnati, 11 Ohio St., 534.

South Carolina:

Florida Cent., etc., R. Co. vs. Columbia, 54 S. Car., 266.

Tennessee:

Howe Mach. Co. vs. Cage, 9 Baxt. (Tenn.) 518;
State vs. Crawford, 2 Head (Tenn.) 460;
Taylor vs. Vincent, 12 Lea. (Tenn.) 282, 47 A. M.

Rep., 338;
Knoxville, etc., R Co. vs. Harris, 99 (Tenn.) 684.

Texas:

Ex p. Gregory, 1 Tex. App. 753;
Thompson vs. State, 17 Tex. App. 253;
Texas Banking etc., Co. v. State, 42 Tex. 636.

As a paramount authority in South Dakota in favor of this proposition, we only deem it necessary to refer to the opinion of the Supreme Court of South Dakota in State vs. Buchler. The language used by Mr. Justice Fuller in his opinion, states most aptly, fairly and correctly, the modern ruling upon that question, a portion of which opinion is well worth producing here, as applying to this case, viz.:

"Pursuant to the will of a majority, aroused to consciousness of the fact that the retail liquor traffic is an expensive evil, resulting in irreparable injury to society, entailing upon the public the burden of increased pauperism and additional criminal prosecutions, often to no avail, the Legislature deemed the license system to be the most effective mode by which to restrict, regulate and control the business; and the law enacted (the statute involved in the case) unmistakably partakes of the nature of a *police regulation* designed to impose upon the dealer the burden of liquidating, so far as practicable, the damage thus occasioned. The primary object of the law, as specifically declared by the title, is to 'provide for the license fee, restricting the regulation of the business of the manufacture and sale of intoxicating liquor'; and the fact that the general revenue is incidentally increased, is not sufficient to invalidate the act, or subject the same to any constitutional objection. * * * The occupation being one which the lawmaking power had the right to prohibit entirely, or partially suppress by the issuance of a license under specified restrictions to persons only who possessed certain moral attributes, the money thus received *is in no constitutional sense a tax*, and the same may be rightly devoted to such public use as the legislature may direct, independently of the expense occasioned by the traffic, and without regard to any of the considerations which prompted the license enactment."

From the foregoing, it conclusively appears there can be no question that we are dealing with an enactment which is not a tax law, and which does not therefore directly attack Inter-State Commerce.

The License required is an Occupation License, and therefore a part of the Internal Machinery of the State, and is not subject to the Commerce Powers of Congress.

The law in question in case at bar required a license of any person who shall engage in "the business of selling or offering for sale any of the above mentioned liquors at retail by any traveling man who solicits orders," etc. The evidence in the cause establishes conclusively that the plaintiff in error did engage in this business; yet counsel for plaintiff in error, before the Supreme Court of South Dakota, cited case after case to show that statute imposing a direct tax upon Inter-State Commerce is void, and does so without discriminating between statutes which makes it an offense to solicit orders for intoxicating liquors, and others which prohibits the soliciting orders for intoxicating liquors, and others which prohibit the soliciting of orders, and which in no wise relate to the license business.

As a general principle, occupation licenses or taxes are constitutional, and the States have a right to provide for the same, unless by direct terms and direct action, they interfere with the Constitution of the United States.

"The right of a State to tax its own citizens for the transaction of any particular trade or profession within the State has not been doubted." "Now, the Federal Government can no more regulate the commerce of the State, than a State can regulate the commerce of the Federal Government. * * * The taxing power of a State is one of its attributes of sovereignty. And where there has been no compact with the Federal Government, or cession of jurisdiction for the purposes specified in the constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the general Government; and as laid down by this Court, it may

be exercised at the discretion of the State. The only restraint is found in the responsibility of the members of the legislature to their constituants.

"If this power of taxation by a State, within its jurisdiction, may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of the State may be thereby essentially impaired. But State power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form of property, real or personal, with the exceptions stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. **These are subjects of State regulation and State taxation; and there is no Federal power under the constitution which can impair this exercise of State sovereignty.**"

This is the language of Mr. Justice McLean, of this Court, delivered in

Nathan vs. The State of Louisiana, 8 How. 73, citing 8 Wall., 184; 12th Wall., 213, 224. 428; 7 Otto 569; 9 Otto, 279; 10 Otto, 95, 499; 4 Blatchf.. 267 16 Pat. Off. Gaz. 1000.

"The power of the legislature to impose license fees on the occupation of manufacturing and selling liquors, is undoubted; and it may also define what are liquors within the meaning of the law." 17th Cyc. L. 2nd ed., 222, and cases there cited.

And the States may license all tax occupations.

21 Cyc. L., 2nd ed., 776. and cases therein cited in note 7 from the following Courts:

United States, Supreme, Alabama, Arizona, California, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Michigan. Mississippi, Missouri, Nebraska, Nevada. New Jersey. New York, North Carolina, Ohio, Pennsylvania. South Carolina, Tennessee. Texas, Virginia and Wisconsin.

To which I add the following:

State vs. Delamater (this case) 104 N. W. (S. D.) 537;
State vs. Klectzon, 8 N. D. 286, 78 N. W., 984;
Elk Point vs. Vaughn. 5th Dak. 115, 46 N. W., 577;
Territory vs. Webster, 5th Dak. 351, 40 N. W. 535.

Control of intoxicating liquors is within the

police power of the State.

In discussing his assignments of error before the Supreme Court of South Dakota, counsel for plaintiff in error almost entirely disregarded one of the most important rights possessed by the States, and which of all others, is the right most in question in this case, and of paramount importance in considering the act of the legislature involved in this case. Counsel relies upon many cases in substantiation of a theory which is not disputed, and which does not in the slightest degree involve the question of the police powers of the State which are involved in this cause; and if the police powers of the States had not been referred to incidently, in one or two or three cases cited, it is apparent that this great principle underlying power would have been lost sight of entirely by the counsel for plaintiff in error.

Believing it necessary to a complete understanding of the rulings upon like questions, we desire to call additional attention to this great fundamental power possessed by the States, and show that in the exercise of this power, the State of South Dakota had and has a perfect right to regulate and control the traffic, sale, distribution and delivery of intoxicating liquors to its people.

Were it not for this power, the authorities cited by counsel for plaintiff in error might be deemed to settle this case in his favor; for it is undoubtedly true that, so far as usual and ordinary goods of commerce are concerned, the State cannot interfere; but when it comes to the point of determining what is best for the welfare, present and future, of the inhabitants of a commonwealth, then the legislature of the commonwealth itself becomes the judge or arbiter, and possesses the concluding power to say how such commerce shall be regulated and its goods distributed to the people.

No provision of the Federal Constitution ever gave Congress the power or the right of indiscriminately placing in the hands of the people of the several States dangerous and meretricious articles for use or consumption. But the power to deny such right,—if rights they can be called,—belongs to the people of the several States of the Union, and is superior in all respects to the commercial

rights of the people of other States.

"In order that social life may exist, that human facilities may be developed, and the progress of civilization be made possible, a certain minimum of physical well-being is necessary. This minimum varies in different periods, and rises with advancing civilization until it includes a certain standard of comfort. Closely connected with physical well-being, is a recognition of elementary moral standards, and a repression of at least the outward manifestations of vice and immorality, in so far as the maintenance of these physical and moral standards depend upon conditions affecting a considerable number of people alike, the government attempts to secure them to the public and to the individual. Criminal justice, the proprietary action of the State, and the police power, are equally enlisted for this purpose.

"The exercise of the police power for the protection, safety, order and morals, constitutes the police in the primary or narrow sense of the term, It is the police power, in this narrow sense of the term, which the Supreme Court of the United States concedes on principle to the States, even where its exercise affects Inter-States and foreign commerce."

From the very beginning of the consideration of the evils of the liquor traffic, we find the Courts holding that the regulation and control of such commerce was within the police power of the States; that this was absolutely necessary for the protection of the life, health, safety and well-being of the inhabitants thereof.

Mr. Chief Justice Fuller, in Wilkerson vs. Rahrer, *supra*;
The License cases, *supra*;
State vs. Delamater, this case, *supra*;
Crowley vs. Christensen, 127 U. S., 86;
U. S. vs. Roman, 33 Fed. Rep., 117;
Gray vs. Conn., 159 U. S., 74;
License Tax Cases, 5 Wall. (U. S.) 462;
Miller vs. Annon, 145 U. S., 421;
Giozza vs. Tiernan, 148 U. S,, 657;
Kidd vs. Pearson, 128 U. S., 1;
Reyman Brew. Co. vs. Bristor, 92 Fed. Rep. 17, and other cases heretofore cited.

It has thus been shown by conclusive authority that a State has a right to regulate its internal commerce, and that it is its duty to provide for the safety, health, morality and prosperity of its own citizens by suitable laws. That such regulations have always been considered by this Honorable Court to belong to the police powers of the States, as also has heretofore been shown conclusively, and that the State possesses the inalienable right to maintain and enforce throughout its jurisdiction the right to regulate its internal trade, and to maintain and enforce municipal police regulations, and thereby promote the welfare of the people. That a statute restraining an indiscriminate traffic in intoxicating liquors, and designed to protect life and health by promoting temperance and sobriety, is a Police Law, has also been conclusively shown.

"In conferring upon Congress the regulations of commerce, it was never intended to cut off the States from legislating upon all subjects relating to the life, health and safety of its citizens."

Sherlock vs. Alling, 93 U. S., 99.

"We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that idleness, disorder, pauperism and crime existing in the country, are in some degree at least traceable to this evil. If therefore, a State deems the absolute prohibition of the manufacture and sale within her limits of intoxicating liquors, for other than medical, scientific and manufacturing purposes, to be necessary to the peace and security of society, the Courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives."

Mugler vs. Kansas, 123 U. S., 662.

"The States may, in the exercise of their police power, in any way regulate the sale within the State of intoxicating liquors, either by prohibiting the sale entirely, * * * or by prohibiting the soliciting or taking of orders in the State for the Inter-State sale of liquors to unlicensed dealers in the State."

Westheimer vs. Weisman, 54 Pac. 332;

Missouri, K. & T. R. Y. Co. vs. Haber 169 U. S. 613.

"The question as to the constitutional power of the State to prohibit the manufacture and sale of intoxicating liquors, is a settled one in this Court."

Foster vs. Kansas, 112 U S., 201.

"Whatever effects the peace, good order, morals and health of the community, comes within its scope and everyone must use and enjoy his property subject to the restrictions which such legislation imposes."

Black on Intoxicating Liquors, §24, page 31.

"Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of life, health and prosperity of the citizen, and to the preservation of good order and public morals."

Id. §25, page 33.

"Finally, although the State may not assume to be the guardian of morals, it cannot be doubted that it has the power to enact measures calculated for the repression of such forms of vice as threaten its welfare by generating disease, pauperism and crime. This is signally true of the unrestricted traffic in intoxicating liquors."

Id. §26 pages 34-5.

Legislative discretion to prohibit entirely, or by means of local option, direct when and where, and under what circumstances, intoxicating liquors may be sold, is a matter so clearly within the exercise of the police power, that the proposition is no longer open to question."

Hann Brewing Co, vs. Foss (S. D.) 91 N. W., 588.

Review of all other material authorities cited by plaintiff in error to support his assignments of error in the Supreme Court of South Dakota.

There are but three cases cited by counsel for plaintiff

in error at the hearing before the Supreme Court of South Dakota, which appear to support the contention of the plaintiff in error on the real point at issue in this cause. These are

State vs. Hickox, (Kansas 1902) 78 Pa. 35,
State vs. Hanophy, (Iowa 1902) 90 N. W., 60; and
In re Bergen, (1900) 115 Fed., 339.

It will thus be seen that two of these cases were disposed of in the same year, and two years subsequent to the passage of the Wilson Act. It will also be observed that the reasoning of the Courts in these cases was founded upon decisions which were rendered during the interim between the passage of the Inter-State Commerce Act, and the Wilson Act. It will also be observed that these cases were decided prior to the decision of this Honorable Court defining the scope of the Wilson Act. Hence we hold that these decisions have been overruled by the holdings of this Court, and therefore, that they do not lay down the law as it is.

Besides this, it is proper to notice that the Hickox case, strongly relied upon by the plaintiff in error, was not based upon the point at issue in the case at bar, as will conclusively appear from the statement of that case by the Court, showing that case was based exclusively on the right to import intoxicating liquors into the State by a resident of another State.

But in

Westheiner vs. Weisman, 60 Kan., 753,

where the point at issue was substantially the same as it is in the case at bar, the Supreme Court of Kansas lays down the doctrine as follows:

"In Westheimer vs. Weisman, 60 Kansas 753, a reference was made to the provision in question and language used which treated the provision as a valid one. However, the question at issue here, *was not involved in that case.*"

From which it may readily be seen that the Supreme Court of Kansas in the Hickox case did not base its decis-

ion upon the point involved in the case at bar.

Furthermore, for the purpose of showing the real ruling of the Kansas Court upon the direct point involved in the case at bar, we will now reproduce a portion of the decision in the Westheimer case, which holds strongly in our favor, to-wit:

"Paragraph 2250 of the General Statute of 1889 is a valid police regulation. That Act is not a regulation of Commerce among the States, simply because it may *incidently* effect commerce.

"The Plaintiffs in error contend that this statute is either inapplicable to the case at bar, or that it is unconstitutional, so far as the same prohibits the *solicitation of orders* by non-residents; that in this respect, the act attempts to regulate or restrict Inter-State Commerce. **This contention is not tenable. The purpose of the act under consideration was to restrict the sale of liquors; and this may be lawfully done, although Inter-State Commerce may be thereby incidentially affected.** Railway Co, v. Haber, decided March 14, 1898, 18 Supt. Ct. 488; Plumley v. Com. 155 U. S, 461; Geer v. State of Connecticut, 161 U. S. 534. * * Under this statute, both the soliciting of an order and the making of a contract of sale are a misdemeanor. ThePlaintiffs do business in St. Joseph (Mo). Their solicting agent is also a resident of that State. He came to Kansas and procured an order of Weisman for intoxicating liquors. The order was transmitted to the plaintiff for approval or rejection. * * *The soliciting of the order,* was a violation of the letter and spirit of the statute. The section under consideration, is a *valid police regulation, and is not an infringement upon the rights of Congress to regulate inter-state commerce.*"

Therefrom it may readily be seen that the Supreme Court of Kansas, in the Hickox case, did not decide the case upon the question involved in the case at bar; for in that case, the court refers to its holdings in the Westeimer case, which did involve the same material point at issue in this case, and therein expressly upheld the po-

sition we take in the case at bar.

In the case of State v. Hanophy, *supra,* we will call attention to the essential differences between that case and the case at bar. In that case, the Iowa Court very reluctantly took a position in favor of the unconstitutionality of the law, and said that, in their opinion, the law was constitutional, but that they were bound by the decision of this court in Leisy v. Hardin, 135 U. S. 100. But it makes no difference upon what ground the Iowa Court was constrained to act in that case, for its action is not applicable to the case at bar, for it is clearly distinguished from this case in this: That it was decided under a statute which prohibited the taking of orders and made it a crime to take an order; while the South Dakota statute does not prohibit the taking of orders or make it a crime, but *licenses the engaging in the business of soliciting orders,* which is not a direct tax upon inter-state commerce, as it was in the Iowa case, but simply required a license for engaging in the business; and if the South Dakota statute imposes any restriction whatever, it is an *indirect* restriction upon inter-state commerce, which we have heretofore shown to be constitutional.

Only one other case is cited by counsel for plaintiff in error which upon first sight seems to support his position, and that is the case of in re Bergen, *supra*; but upon a close examination of the opinion, it appears beyond dispute that by reason of the difference between the statute under consideration in that case, and the statute involved in the case at bar, the holding of the court in that case cannot be considered to be of any great force in this cause. The opinion in that case was simply an oral one, delivered by one of the District Judges, and goes only to the extent of holding that the Kansas statute, which makes it a criminal offense to take or receive an order for intoxicating liquors, is a direct interference with inter-state commerce. There is absolutely nothing in the opinion in that case which is inconsistent with our contention in the case at bar. Furthermore, Mr. Justice Hook, by his language in that case, shows that he appreciates the dis-

tinction we are drawing in this case; for he specifically refers to the Westheimer case, *supra*, and said that the judgment in that case was based upon different ground. In other words, that case did not show a personal order for intoxicating liquors, but showed a practice of engaging in the business contrary to the letter and spirit of the statute, which to that extent, was a valid police regulation, and not an infringement upon the rights of Congress to regulate inter-state commerce.

However, in consideration of these three liquor cases, upon which counsel so strongly relies, it is only necessary for us to show the difference of the statutes in question therein from the statute involved in the case at bar; and this may best be done by reference to the decision of this Honorable Court in the case of People v. Walling, 116 U. S., 446. In that case this court had under consideration the identical statute involved in the case at bar, except that the Michigan Statute, then under consideration, was directed solely against the soliciting of orders by non-residents. The following is the Michigan statute under consideration in that case:

"§1. The People of the State of Michigan enact: That every person who shall come into or being in this state, shall engage in the business of selling spirituous and intoxicating, malt, brewed or fermented liquors to citizens or residents of this state, at wholesale, or of soliciting or taking orders from the citizens or residents of this state for any such liquors to be shipped into this state, or furnished, or supplied at wholesale to any person within this state, not having his, their or its principal place of business within this state, shall, on or before the fourth Friday of June in each year, pay a tax of $300.00, if engaged in selling, or soliciting, or taking orders for the sale of, such spirituous and intoxicating liquors, and $100 for malt, brewed or fermented liquors. Such tax shall be paid to the Attorney General and by him paid into the state treasury, to the credit of the general fund."

People v. Walling, 116 U. S., 446.

This Court held that statute to be unconstitutional *solely* because it discriminated between residents and nonresidents of Michigan. For that reason, and for no

other, the law was held to be unconstitutional; but the Court went on to say that if said law had included residents and non-residents alike, it would have been a constitutional statute. The decision of the Court, speaking through Mr. Justice Bradley, was concurred in by all the Justices of this Honorable Court who sat in that case, and is in the following words:

"It is suggested by the Judge, who delivered the opinion of the Supreme Court of Michigan in this case, that the tax imposed by the Act of 1875 is an exercise of the legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors and the preservation of the health and morals of the people. This would be a perfect justification of the Act if it did not discriminate against the citizens an products of other States in the matter of commerce between the States and thus usurp the prerogatives of the National Legislature."

This case has been used by text writers as substantiating our theory.

Freund on Police Power, §232, page 217.

We therefore insist that no authority has been presented by counsel for plaintiff in error on the hearing of this case before the Supreme Court of South Dakota which holds that the statute under consideration in the case at bar is unconstitutional. Every other authority cited by opposing counsel has had reference either to the general goods of commerce which do not come within the proper police regalation of the several States, or involve dissimilar statutes, which are not based upon occupation or business. And each and all of these have been completely overthrown by the decision of this Honorable Court.

CONCLUSION.

In conclusion, it is earnestly maintained that we have conclusively established the following enumerated propositions of history and law, to-wit:

I.- That from the first session of the Colonial Congress, in October 1765, onward to the acknowledgement of American Independence and Sovereignty by the Treaty of Paris, September 3rd, 1783, the several Colonies and States, by means of the several legislatures thereof, always controlled, regulated or entirely prohibited, the manufacture and sale of intoxicating liquors in their own respective ways, and subject to no restriction whatever by the Continential Congress.- (See this Brief, pp. 12. etc.)

II.- That from the said Treaty of Paris onward to the inauguration of our Government under our present Constitution, March 4. 1789, covering a period of exactly five years, six months and one day, the several states continued to control the liquor traffic in the same way, subject to no restriction whatever by the Federal Congress. (See this Brief, pp. 13, 14 and 15.)

III.- That from the Inauguration of the Federal Government under our present Constitution, March 4, 1789, onward to the approval of the Foreign and Inter-State Commerce Act, February 4, 1887, embracing another period of exactly 97 years and 7 months, the several States of the American Union still continued to control the liquor traffic in their own respective ways, and always and at all times subject to no restriction whatever by Congress.— (See this Brief pp. 13, 14, 15 etc.)

IV.— That these three periods of time cover the exact era of 121 years, and 4 months, during all of which time the Colonies and States respectively controlled the liquor traffic in their own way, always and at all times subject to no outside control. (Id.)

V.— From all of which we insist that, through long usage, always acquiesed in by everybody for nearly a century and a quarter of time, the absolute right of the several States to control this traffic within their own respective jurisdictions, has thereby been enacted as a fundamental provision of the unwritten Constitution of the United States of America; and that the same can be rightfully altered or changed in no way whatever, except as

provided in the written Federal Constitution.

VI.— That such amendment never has been changed by the sovereign power—the People of the several States.

VII.— That it has been conclusively shown, that the *creature* cannot be superior to the *creator*; that the people of the several States, *by States*, created the Congress; and hence, that the people of the several states by states, were the creators of the Congress; and that the Congress is simply the creature, of the States—nothing more,—nothing less.—(See this Brief, p. 12 etc.)

VIII.—That we have conclusively shown step by step, exactly how the Articles of Confederation and the present Federal Constitution were formed, and how, and under what circumstances they came to be adopted; and that, in so doing, the people of the several States reserved to each State respectively its paramount right to regulate its own police affairs in its own way, subject to no outside control.—(See this Brief, pp. 4, 5, 6, 7, 8, 9, 10, 11.)

IX.— That we always concede that Congress has the undoubted right finally to decide the outward boundaries of the rightful police power of the States; otherwise, endless confusion would follow. But when Congress and this Honorable Court have once marked the boundary of police power, and have laid down the doctrine that the traffic in intoxicating liquors comes within the police power of the States, that then and in that case the rights of the States, under their respective police powers, at once becomes absolute; and that, thereafter, Congress has, and can have, no right whatever to interfere with the laws of the several States which control and regulate this traffic.—See this Brief, p. 25.)

X.—That we have conclusively shown by the non-action of Congress during more than a century of time, and by the affirmative action of this Honorable Court by its decisions in the license cases, *supra*, and many other

cases heretofore cited, that the Federal Government has thereby determined and decided that the traffic in intoxicating liquors comes within the proper and legitimate police powers of the several States; and that, in so doing, the legislatures of the several States are not encroaching or usurping any of the powers delegated to the government through the Federal Constitution.—(See this Brief, pp. 39-46.)

XI.—That we have conclusively shown, from the decisions of the courts of last resort of the several States, that each State has always exercised the right to control the traffic in intoxicating liquors within its own jurisdiction, in its own way, and so as best to subserve the welfare of its own people.—(See this Brief, pp. 13, 14, 15, 37, 38, 39, 46, 47, 48, 49, 50, 51, 52, etc.)

XII.—That we have also shown that immediately following the passage of the Inter-State Commerce Act, the wholesale dealers in intoxicating liquors at once took the position that, inasmuch as Congress had now spoken on the question of Inter-State Commerce, that the States were thereby deprived of the right in any way to regulate the traffic in intoxicating liquors.—(See this Brief, pp. 16, 17, etc.)

XIII.—That thereupon, finding that the intention of Congress, in the passage of theInter-State Commerce Act, was thus being misconstrued by the wholesale liquor dealers and others, Congress came to the rescue of the people and passed the well-known Wilson Act for the purpose of defining the true intention of Congress in the passage of the Inter-State Commerce Act; that by the terms of the Wilson Act, the rights of the several States to control the liquor traffic within their own several jurisdictions was thereby specifically recognized.—(See this Brief, pp. 19, 20, 21, 22, 23.)

XIV.—That we have conclusively shown that the

decisions, relied upon by plaintiff in error, which came out during the interim between the passage of the Inter-State Commerce Act and the Wilson Act and other decisions based thereon, do not lay down the law correctly, according to the holding of this Honorable Court.—(See this Brief, pp. 31, 32, 33, 34, etc.)

XV.—That we have conclusively shown that a license law is not a tax law and hence, that the States have a right to enact license laws regulating suitable occupations, and that such laws are not in conflict with §8, article 1 of the Federal Constitution.—(See this Brief, pp. 62, 63, 64, 65, 66, 67, 68, 69.)

XVI.—That it has been conclusively shown that the statute under which the plaintiff in error was convicted in the trial court, is a License and not a Tax Law; hence, it does not provide for any tax upon inter-state commerce, and in no wise conflicts with §8 of article 1 of the Federal Constitution.—(See this Brief, pp, 55, 56, 57, 58-9.)

XVII.—That the South Dakota statute under which the plaintiff in error was convicted in the trial court, makes no discrimination whatever, either in favor of or against, the inhabitants of South Dakota or any other State; and hence that, under the decision of this Honorable Court in People v. Waliing, 116 U. S. 446, does not conflict with §8, of article 1, of the Federal Constitution, and hence is a valid statute.—(See this Brief, pp. 55, 56, 57, 58-9.)

XVIII.— We have also shown that, by the continuous and exclusive control by the several Colonies and States of the traffic in intoxicating liquors throughout an era of more than 121 years, prior to the passage of the Inter-State Commerce Act, the several States had thereby unanimously enacted an unwritten amendment to the constitution declaratory of the absolutely reserved rights of the States to control the liquor traffic in their own way subject to no outside control whatever; and that such, amendment, so made is just as binding upon the Federal

Government as is the unwritten constitution of England upon Great Britain that such amendment so made, can neither be changed nor abrogated, except in the manner provided in the Federal Constitution,—(See this Brief, pp. 25, 26, 27, 28, 29, 30. etc.)

XIP.— That we have shown beyond successful contradiction, by the decisions of this Honorable Court, the traffic in intoxicating liquor comes peculiarly within the police powers of the several States: that the exercise of Federal Jurisdiction thereover would result in the repeal of more wise legislation enacted by the several States than Congress would be likely to enact for a century to come; and that, as a matter of practical fact, Congress would be entirely unable properly to deal with this matter so as best to subserve the welfare of each of the several States.—(See pp. 26, 34.)

"It is hardly possible for Congress to deal at all with the details of this important matter."—(Mr. Justice Catron in the License Cases, 5th How., page 569.—" It is the undoubted and reserved power of every State here, as a political body to decide, independent of any provisions made by Congress, * * what kind of property and business it will tolerate and protect." —(Mr. Justice Woodbury, in license cases, 5th How. 659."—It has been frequently decided by this Court, that the powers which relates to merely municipal regulation, or what may more properly be called internal police, were not surrendered by the States, or restrained by the Constitution of the United States; and that consequently, in relation to these **the authority of a State is complete, unqualified and conclusive."** (Mr. Justice Grier, Id.) "The power of the State to impose restraint and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, **is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the constitution of the United**

States, and is essentially exclusive."—Mr. Justice Fuller, of this Court, in delivering the opinion in Wilkerson v. Rahrer, 140 U. S. 574. (See this Brief pp. 33.)

XX.— That we have conclusively shown that Congress has not, and never had, the *exclusive* right to regulate inter-state commerce; but that the several States have at all times since the adoption of the Constitution, as they certainly did prior thereto, continued to regulate inter-state commerce in their own way, relative to all matters which are local and not national in character, except that they could rightfully levy no tax thereon, or interfere with the rightful regulation thereof by Congress relative to all matters which are national and not local in character.—(See opinion of Mr. Justice Catron, of this Honorable Court, pp. 26, 27 and 28 of this Brief.)

Finally we feel it incumbent upon us to say that the State of South Dakota and all her people are vitally interested in sustaining the statute in question in all its parts and provisions. That the people in every State in the American Union are likewise interested in State control of the traffic in intoxicating liquors. That, in good faith, the legislature of the State of South Dakota has sought to restrain and regulate a traffic, the evils of which have been so well protrayed by this Court. That in furtherence of the welfare of the people, and in full accord with the inherent rights of a sovereign State, this law is now aiding in the regulation of a traffic, the existence of which is certainly a menace to thousands of homes. That we insist we have clearly shown that the decision of the Supreme Court of South Dakota, affirming the conviction of the plaintiff in error in the Court below, was and is both legally and morally just and right; and that we have a right to insist that that decision should be affirmed by this Court, with costs of suit.

Finally in the name and on the behalf of pratling children, clad with innocence, playing around the firesides of untold thousands of homes through-out all America, we

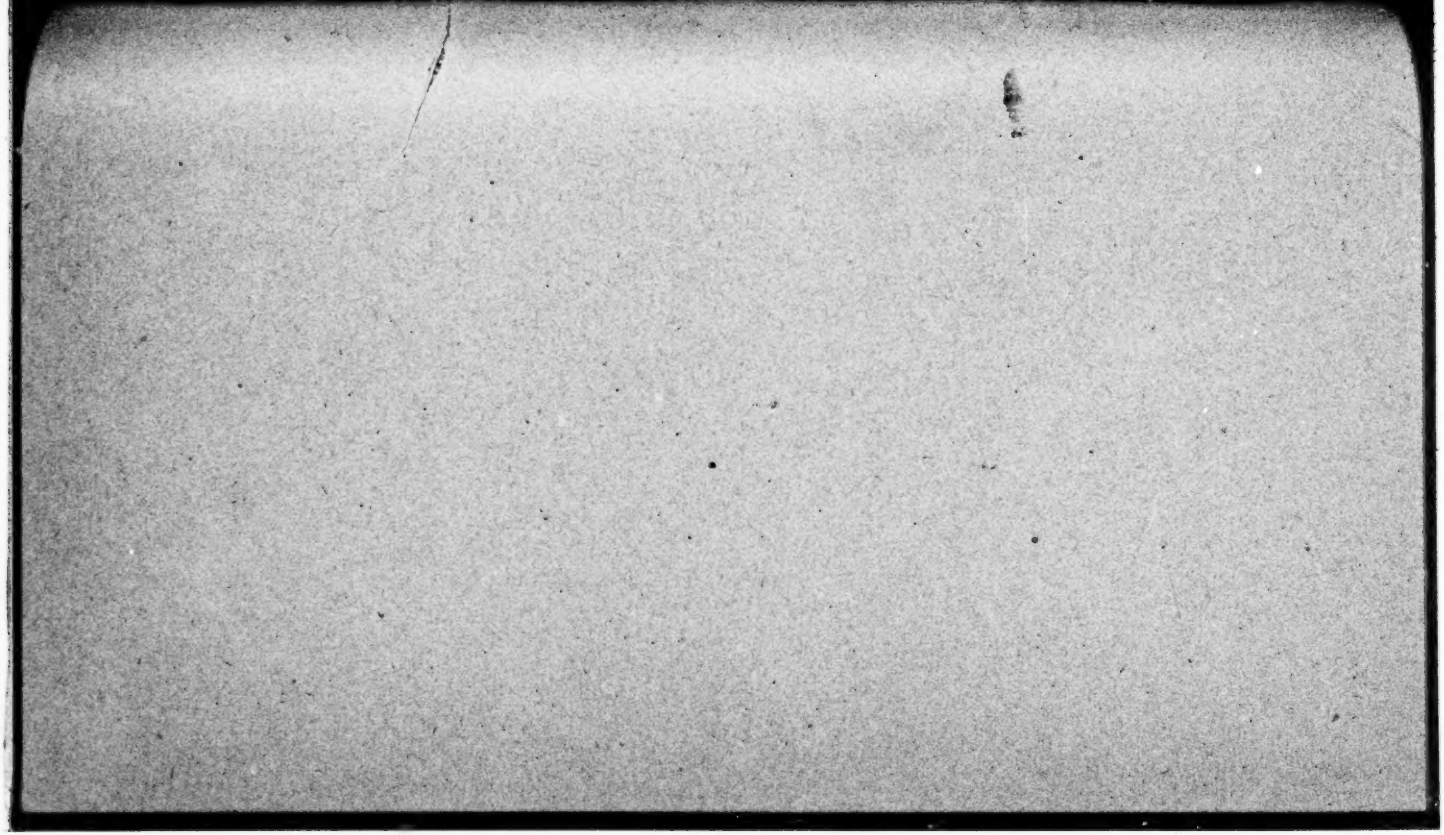
make this final appeal to this most Honorable Court to sustain and uphold the judgment of the highest Court in our State, the citadel of our welfare,—the Gibraltar of our safety.

All of which is respectfully submitted.

S. M. HOWARD,

Attorney for Defendant in Error,

Gettysburg, South Dakota.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY
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No. 149.

JAY DELAMATER, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH DAKOTA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF FOR THE DEFENDANT IN ERROR.

PHILO HALL,
Attorney General, South Dakota.
AUBREY LAWRENCE,
Assistant Attorney General.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24761

(19,963.)

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

Counsel for the plaintiff in error having kindly consented to the filing of a brief by the attorney general's office of South Dakota on behalf of the defendant in error, and this honorable court having granted leave to counsel for defendant in error to file a further and additional brief, other than the one heretofore filed by S. M. Howard in behalf of the defendant in error, we herewith respectfully present the following:

We desire to add nothing further to the statement of the case except to especially direct the attention of the court to several facts established by the record and admitted and conceded by the plaintiff in error, which we believe are important in considering the constitutionality of the legislative act in question, as follows:

FIRST. It appears that the defendant, the plaintiff in error, does not assert as a defense, or as a means whereby he can take advantage of the interstate commerce clause, that he is a non-resident of the State of South Dakota, but, so far as the record discloses, is a citizen and resident of the State of South Dakota.

SECOND. Regardless of the place of residence of the defendant, it is admitted and conceded and established by the evidence in the case that the defendant, the plaintiff in error, transacted the business in question entirely within the boundaries of the State of South Dakota, and not only made an offer to sell and a solicitation prohibited under the terms of the act in question, but engaged in the business of offering for sale intoxicating liquors, and soliciting such sales, and did voluntarily engage in such business within the boundaries of the State of South Dakota.

THIRD. That it appears by the record that the license in question is one imposed upon the soliciting of orders involving retail transactions and not wholesale as between dealers resident and non-resident, or where both dealers were resident, and that the business in which the plaintiff in error engaged was a business of offering for sale at retail within the State of South Dakota, and soliciting orders for the sale at retail, of intoxicating liquors within the boundaries of the State of South Dakota.

FOURTH. That it is disclosed by the record and established by the testimony that the defendant, the plaintiff in error, voluntarily submitted his person to the jurisdiction of the State of South Dakota for the assumed permanent business of engaging in such retail liquor trade, which was prohibited by the legislature of the State of South Dakota, unless such business was conducted in the manner and form as pre-

scribed by the legislature and under the restrictions imposed by the legislative act in question.

Upon these facts, therefore, the defendant in error begs leave to submit the following legal propositions:

FIRST. That, as a general principle, the law in question is a license law and not a tax law.

SECOND. That the law is one within the police power of the State, and thus subject to different rules, whenever jurisdiction attaches, than the ordinary goods of commerce.

The foregoing being established, it necessarily follows:

(*a.*) That the interstate commerce clause is not directly involved, because the defendant engaged in a business within the State which consisted of performing acts which led up to the sale and delivery of intoxicating liquors which could only be done in the State under the methods prescribed by the act in question. In other words, that the solicitation was a part of the sale, and the solicitation, fully occurring within the State, is subject to the police powers of the State.

(*b.*) That the law in question is an occupation or privilege license law over which, as concerns the sale of goods within the police power of the State, the State has complete jurisdiction without it being considered an interference with the interstate commerce clause.

BRIEF.

First. The law is a license law and not a tax law.

We apprehend it is thoroughly established by this court that the mere fact that a law of this character results in bringing a certain revenue to the State does not necessarily stamp such an act as a revenue or tax law, but that the real test is as to whether or not the purpose of the act was to secure revenue or regulate and control.

As indicating the established law, gathered from the decisions of this court and others upon that proposition, permit us to cite the following:

"According to the great weight of authority, the power inherent in the legislature to regulate the exercise of privileges and of following pursuits and occupations does not fall properly within the taxing powers, but falls within the police powers. License fees exacted by the general laws regulating the traffic in intoxicating liquors are not taxes within the meaning of any constitutional provision relating to taxation, but are nothing more than the price paid for the privilege of doing a thing, the doing of which the legislature has a right to prohibit altogether. These laws are regarded as police regulations enacted with a view of regulating and restricting a business regarded as evil in its effects upon society. It does not follow that because the license is large or because it may become a part of the public revenue, it is therefore a tax."

17 Ency. of Law, 2d ed., p. 223, and citations.

"Licenses imposed on the liquor traffic and other occupations which call for regulations by the State, do not cease to be licenses proper even though they yield a revenue in excess of that required for the purpose of regulation."

21 Ency. of Law, 2d ed., p. 774.

"Occupation taxes are not property taxes."

Ibid., p. 775.

The interpretation of the South Dakota courts upon the legislative act in question, which we assume will be considered by this court, is to the same effect:

"Pursuant to the will of a majority, aroused to consciousness of the fact that the retail liquor traffic is an expensive evil, resulting in irreparable injury to society, entailing upon the public the burden of increased pauperism and additional criminal prosecutions, often to no avail, the legislature deemed the license system to be the most effective scheme by which to restrict, regulate and control the business, and the law enacted unmistakably partakes of the nature of a police regulation designed to impose upon the dealer the burden of liquidating, so far as practicable, the damage thus occasioned. The primary object of the law, as specifically declared by the title, is to 'provide for the licensing, restricting, and regulation of the business of the manufacture and sale of intoxicating liquors;' and the fact that the general revenue is incidentally increased is not sufficient to invalidate the act, or subject the same to any constitutional objection. * * * The occupation being one which the law-making power had the right to prohibit entirely or partially suppress by the issuance of a license under specified restrictions to persons only who possess certain moral attributes, the money thus received *is in no constitutional sense a tax*, and the same may be rightfully devoted to such public use as the legislature may direct, independently of the expense occasioned by the traffic, and without regard to any of the considerations which prompted the license enactment."

State *v.* Beuchler, 10 S. D., 156.

In addition to the foregoing, and as practically controlling, we desire to quote the title of the act in question:

"SECTION 1. That section seven of chapter 72 of the Session Laws of 1897, the same being an act relating to the sale of intoxicating liquors, entitled 'An act to provide for the *licensing, restricting, and regulation of the manufacture and sale* of spirituous and intoxicating liquors' be amended to read as follows."

See Session Acts, South Dakota, 1901, p. 246.

The law is one within the police powers of the State, and thus subject to different rules than laws concerning the ordinary goods of commerce.

The law in question has been established to be a law restricting and regulating an article declared injurious by the legislature of the State, which we apprehend has the authority to declare what subjects are so deemed injurious and harmful, and thus within the police powers. The text writers lay down the following general principles:

"In order that social life may exist, that human faculties may be developed, and the progress of civilization be made possible, a certain minimum of physical well-being is necessary. The minimum varies in different periods, and rises with advancing civilization until it includes a certain standard of comfort. Closely connected with physical well-being is a recognition of elementary moral standards, and a repression of at least the outward manifestations of vice and immorality, in so far as the maintenance of these physical and moral standards depends upon conditions affecting a considerable number of people alike, the government attempts to secure them to the public and to the individual. Criminal justice, the proprietary action of the State, and the police power, are equally enlisted for this purpose.

"The exercise of the police power for the protection of safety, order, and morals constitutes the police in the primary or narrower sense of the term. It is a power so vital to the community that it is often conceded to local authorities of limited powers. It is the police power in this narrower sense of the term which the Supreme Court of the United States concedes on principle to the States, even where its exercise affects interstate and foreign commerce."

Freund on Police Powers, sec. 10, p. 7.

Regardless of the Wilson act, which more fully placed intoxicating liquors within the police power of the State, this court for many years sustained the doctrine laid down in the celebrated License Cases:

"It may, then, be assumed on authority which does not admit of doubt, that a State has a right to regulate its internal

commerce, and to provide for the health and government of its citizens by suitable laws. That such regulations are considered by this court to be police laws will not be doubted. These propositions are sustained by high authority. The State possesses the undeniable right to regulate its internal trade, and to maintain municipal or police regulations to protect and promote the welfare of the people. That a law restraining an indiscriminate traffic in wines and spirits, and designed to protect life and health by promoting temperance and sobriety, is a police law cannot be questioned."

License Cases, 5 How., 523 (12 Law ed., 265).

"In conferring upon Congress the regulation of commerce it was never intended to cut the States off from legislating upon all subjects relating to the life, health and safety of their citizens."

Sherlock *v.* Alling, 93 U. S., 99 (23 Law ed., 819).

"The question as to the constitutional power of the State to prohibt the manufacture and *sale* of intoxicating liquors is a settled one in this court."

Foster *v.* Kansas, 112 U. S., 201.

If it is a settled question that the State has the constitutional power to prohibit even the manufacture and sale of intoxicating liquors, then it must undoubtedly have the power to regulate and restrict the sale of intoxicating liquors, and as a part of that power has the undoubted constitutional right to regulate and control any act in furtherance of such sale, or any offer of sale completed within the State boundaries which would lead up to the sale, which is restricted and controlled by the legislative act. This is not an interference with the interstate commerce clause and cannot be said to act before the goods come within the jurisdiction of the State, because under the facts in the case at bar the person who commits the act in question has voluntarily appeared within the boundaries of the State and submitted himself to the laws of that State, and has voluntarily chosen to come within the State to engage in the business which is restricted and controlled under the constitutional authority of the State.

The foregoing being established, the act in question does not conflict with the interstate commerce law for two reasons:

(*a.*) That the acts involved are committed by a person within the jurisdiction of the State.

(*b.*) Because he voluntarily engages within the State in an occupation prohibited under the police power of the State.

As to the first proposition, permit us to quote the following, not as authority to this honorable court, but as expressing, in the language of the text writers, the theory which we might express in our own words upon which the State, the defendant in error, relies:

"The taking of the order by the plaintiff for intoxicating liquors *was a part of the contract of sale.*"

Lang *v.* Lynch (New Hampshire), reported in 4 L. R. A., 831.

The author of the notes to the L. R. A., in considering the case of Brown *v.* Weiland, 61 L. R. A., 418, and in commenting upon the New Hampshire licence cases, which he holds are renewed authority since the passage of the "Wilson act," sustains our position that the soliciting is a part of the sale. Of course there can be no question but that the actual sale within this State of these goods is within the police power of the State, and the plaintiff in error does not pretend to dispute that proposition. Our position is that if the sale is within the police power of the State the incidents of the sale are, and the authority of these notes takes the same position in the following language:

"The prohibitory or regulative statute of the forum may, however, either in express terms or by construction, apply to, and render illegal, acts done within the State in *furtherance of the sale, although the sale is technically consummated in another State* by the law of which it is valid. When such is the case, it is not necessary for the court of the forum to resort

to the ground of public policy to justify its refusal to entertain the action, but the action fails because *one of the steps leading to the consummated contract and sale* had its situs at the forum, and comes within the condemnation of the statute of the forum."

The identical question in the case at bar is not involved in the last citation, but the point to which we wish to direct attention is established by that authority, namely, that a solicitation is an act in furtherance of the sale, although the sale is technically consummated in another State, and such solicitation or offer to sell is one of the steps leading to the consummated contract and sale, and such steps and acts were taken voluntarily by the defendant, the plaintiff in error, within the boundaries of the State of South Dakota and against its legislative act passed by virtue of its police power.

The State courts have also sustained the same theory. In *Ex parte* Taylor, 58 Miss., 478, it is said that drummers are mere solicitors of orders for others and differ in no respect from clerks or salesmen except that they are ambulatory in their operations and do not usually carry or deliver the goods sold.

"The residence of the person who pursues the business is immaterial."

Bates *v.* Mobile, 46 Ala., 158.
Mason *v.* Cumberland, 92 Md., 451.
Washington *v.* McGeorge, 146 Pa. St., 248.

But as conclusive upon this proposition, and we apprehend as settling it beyond question, permit us to quote from the opinion of this court in the case of Ficklen *v.* The Taxing District of Shelby County, a Tennessee case coming from the same district as the celebrated Robbins case, decided in 1891, and reported in 145 U. S., page 1:

"A State legislature may tax trades, professions, and occupations in the absence of inhibition in the State constitution in that regard, and where a resident citizen engages in general business subject to a particular tax, the fact that the business

done chances to consist, for the time being, wholly or partially in *negotiating* sales between resident and non-resident merchants of goods situated in another State, does not necessarily involve the taxation of interstate commerce, forbidden by the Constitution."

It thus seems to be well established by the ruling of this court that without question where a resident citizen engages in a general business, subject to a particular tax, the act levying that tax or license is not void because of conflict with the interstate commerce act because the business consists in negotiating sales between residents and non-residents.

In the case at bar the facts are conclusively established that the defendant, the plaintiff in error, was within the State which had the legislative act in question; that he had submitted himself to its jurisdiction, and there is an entire absence of any showing that he was a non-resident, which would be necessary upon the part of the plaintiff in error if he desired to maintain any theory that such non-residence would change the right of the legislature to impose this license, and goes further in showing that the act of negotiating sales, such as exists in the case at bar, is as fully within the jurisdiction of the State as would the completed sales be or the delivery of the goods involved in such sales. So that it appears, we believe, by undoubtedly the weight of authority that the offering for sale, the soliciting for orders and the negotiation for sales, such as took place in this case, constitute acts in furtherance of a sale, within the State, of intoxicating liquors, and leads to the sale of liquors in the State in opposition to the regulation and control as provided by the State laws and cannot be in conflict with interstate commerce, because it is not in the slightest degree similar to the case of an order sent by mail by a resident to a non-resident dealer, but is an act committed by a person within the boundaries of the State, which leads to the result controlled, regulated, and, in some instances, prohibited by the State law of the jurisdiction where the defendant voluntarily placed himself.

An Occupation or Privilege License.

As a general proposition and principle the legislature has the power to impose occupation licenses or taxes.

"The power of the legislature to impose license fees on the occupation of manufacturing and selling liquors is undoubted, and it may also define what are liquor dealers, within the meaning of the laws."

17 Ency. of Law, 2nd ed., 222, and citations.

"The residence of the person who pursues the business is immaterial."

Bates *v.* Mobile, 46 Ala., 158.
Mason *v.* Cumberland, 92 Md., 451.
Washington *v.* McGeorge, 141 Penn. St., 248.

"The State may, in the exercise of their police power, in any way regulate the sale within the State of intoxicating liquors, either by prohibiting the sale entirely; * * * *or by prohibiting the soliciting or taking of orders in the State for the interstate sale of liquors to unlicensed dealers in the State.*"

Cyc., vol. 7, p. 437-8-9, and citations.

The State courts have concurred in that principle.

"Paragraph 2550 of the general statutes of 1889 is a valid police regulation. That act is not a regulation of commerce among the States simply because it may incidentally affect commerce.

"The plaintiffs in error contend that this statute is either inapplicable to the case at bar or that it is unconstitutional so far as the same prohibits the solicitation of orders by non-residents; that in this respect the act attempts to regulate or restrict interstate commerce. *This contention is not tenable. The purpose of the act under consideration was to restrict the sale of liquors, and this may be lawfully done, although interstate shipment may be thereby incidentally affected.* Railway Co. *v.* Haber, decided March 14, 1898, 18 Sup. Ct., 488; Plumley *v.* Com., 155 U. S., 461; Geer *v.* State of Connecticut, 161 U. S., 534. * * * Under this statute both the soliciting of an order and the making of a contract of sale

are a misdemeanor. The plaintiffs do business in St. Joseph. Their soliciting agent is also a resident of that State. He came to Kansas, and procured an order of Weisman for intoxicating liquors. The order was transmitted to the plaintiffs for approval or rejection. * * * The soliciting of the order was a violation of the letter and spirit of the statute. *The section under consideration is a valid police regulation, and is not an infringement upon the rights of Congress to regulate interstate commerce.*"

Westheimer *v.* Weisman, 60 Kansas, 753; 54 Pac. Rep., 332.

This court in the earlier days, at least by inference, sustained this principle. In the case of the People *v.* Walling, 116 U. S., 446, involving a statute practically identical with the South Dakota statute, except that the tax imposed was a tax upon non-resident solicitors, this court said:

"It is suggested by the judge who delivered the opinion of the supreme court of Michigan in this case, that the tax imposed by the act of 1875 is an exercise of the legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors and the preservation of the health and morals of the people. *This would be a perfect justification of the act if it did not discriminate against the citizens* and products of other States in the matter of commerce between the States, and thus usurp one of the prerogatives of the national legislature."

Again it said:

"*Such legislation may, indeed, indirectly or incidentally affect trade* in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States. For, as said by this court in Sherlock *v.* Alling, 93 U. S., 99 (23 Law. Ed., 819): 'In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. *Legislation, in a great variety of ways, may affect commerce and persons*

engaged in it without constituting regulation of it within the meaning of the constitution. And it may be said, generally, that the legislation of a State, not directly against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, *is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water or engaged in commerce, foreign or interstate, or in any other pursuit.*"

Plumley *v.* Massachusetts, 155 U. S., 471 (39 L. Ed., 227).

Again:

"To treat as condemned by act all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. *There must be some direct and immediate effect upon interstate commerce in order to come within the act.* The State may levy a tax upon the earnings of a commission merchant which were realized out of sales of property belonging to non-residents, and such a tax is not one upon interstate commerce because it affects it only incidentally and remotely, although certainly."

Hopkins *v.* United States, 171 U. S., 591 (43 L. Ed., 296).

As the theory of the defendant in error is expressed in language better than we could express it, and not because we desire to offer a State decision as authority for this court, permit us to quote language particularly applicable to the case at bar:

"The citizen of another State may come into Pennsylvania when he will, and where he will, stay as long as he chooses, open as many places for the sale of his goods as he may see fit, and enjoy the same measure of freedom in regard to the conduct of his business as a native citizen. But when he comes within the State, permanently or temporarily, he is under the protection of its law, and *the correlative duty of obedience rests on him.* His rights are equal to but not above those of the citizen. (Neither would he have any more

right to solicit orders for sale than the citizen.) * * * To hold the contrary would be subversive of law and order, and would render the possession of the police power useless to the State. * * * If it is true that such person is the ward of the Federal Constitution, engaged in interstate commerce, with the power of the Government of the United States interposed between him and the police power of the State, it must be admitted that we have stumbled on a startling and unlooked for result of the investment of the General Government with the power to regulate commerce. Fortunately, the Federal courts do not so hold. They distinctly recognize the police power of the States and their right to forbid altogether the sale of such articles as are injurious."

Commonwealth *v.* Gardner (Pa.), 7 L. R. A., 669.

"Unlike other trades and employments, which it is the right of the citizen to pursue, undisturbed by arbitrary legislative interference and control, the person who engages in this, must, within the limitations above indicated, do so subject to such disadvantages and restraints as may be prescribed by the law making power which authorizes it."

State *ex rel.* Henshall *v.* Ludington, 33 Wis., 107.

This court has also said:

"The question whether a given State law is a lawful exercise of the police power is still open, and must remain open to this court. Such a law may forbid entirely the manufacture and sale of intoxicating liquors and be valid. Or it may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid. But the State cannot, under the Congressional legislation referred to, establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful."

Scott *v.* McDonald, 165 U. S., 58 (41 Law. Ed. 632).

If the law may constitutionally forbid entirely the manufacture and sale of intoxicating liquors, and may provide regulations for the inspection and sale, why may it not provide regulations for the person who comes within the juris-

diction and violates such regulations? And, as said by this court in Ficklen *v.* Taxing District:

"A State legislature may tax trades, professions, and occupations * * * The fact that the business done chances to consist for the time being wholly or partially in negotiating sales between resident and non-resident merchants of goods situate in another State does not necessarily involve the taxation of interstate commerce forbidden by the constitution."

Therefore, being to all intents and purposes a resident citizen, and being within the jurisdiction of the courts and the legislature, the defendant, the plaintiff in error, who voluntarily took upon himself the engaging in the controlled and restricted business in the State, did so as a citizen engaging in business in that State and not as a non-resident, and the non-resident liquor firms in the State of Minnesota were not involved in this jurisdiction or in this case, but only the individual who violated the law by engaging in the business or occupation in opposition to the laws of the State, in a commerce which this court has declared to be within the police powers of the State, and such commerce has not only been declared to be within the police power of the State as a general principle and by the legislative declaration of the authority in question, but such police powers have been strengthened and added to, and the principle more firmly established by the force and effect given the Wilson law.

Permit us to add here that all the authorities cited by counsel for plaintiff in error are either decisions rendered prior to the passage of the Wilson act or involve goods of commerce not within the police powers of the State, or were rendered under statutes entirely dissimilar to the statute in question, in that they referred to individual and particular sales and not to engaging in any business. All of the authorities cited, upon investigation, will be found subject to such criticism. We need only cite one, namely, the case referred to by counsel in his closing argument, to wit, *In re* Bergen, 115 Fed. Rep., 339.

Finally, it is almost needless to refer to the rulings of this court that in order to render a law unconstitutional the interference with the interstate commerce clause must be direct and not indirect.

See Hopkins *v.* U. S., 171 U. S., 591.
Sherlock *v.* Alling, 93 U. S., 99.
Ficklen *v.* Taxing District, *supra.*
Missouri K. & T. R. Co. *v.* Haber, 169 U. S., 913.

In addition to all this, times without number this court, beginning with the honored Chief Justice Marshall, has said that in order to declare a legislative act unconstitutional, it must be clearly and plainly established to be a plain and palpable violation of the constitution, Chief Justice Marshall saying, in the case of Plumley *v.* Mass., 155 U. S., 471—

"the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers not delegated to the Union, the judiciary of the United States should not strike down a legislative enactment of a State, especially if it has direct connection with the social order, the health and the morals of its people, unless such legislation plainly and palpably violates some right granted or secured by the National Constitution or encroaches upon the authority delegated to the United States for the attainment of objects of national concern."

"The court entertains a very strong, even conclusive presumption in favor of the validity of the said statute, enacted in good faith to protect the lives, health, and safety of its citizens."

Powell *v.* Penn., 127 U. S., 678.
Mugler *v.* Kansas, 123 U. S., 664.

To summarize, therefore, permit us to again state that the contention of the plaintiff in error should not be sustained, and the legislative act in question should not be declared void and of no effect, because:

1. The act is not a tax law or a tax upon goods of commerce, but is a license law.

2. Such license law is within the police powers of the State: Because of general principles and as held by this court from the beginning, where the jurisdiction of the State attaches to the person, as it does in this case, as well as to the goods.

The foregoing being established, there has arisen in this case, under the facts, acts done in furtherance of a prohibited sale within the jurisdiction of the State by a person within such State, and, secondly, such person came voluntarily within the limits of the State and engaged in a prohibited occupation; that is, prohibited without the payment of the license, and thus rendered himself amenable to the State laws, regardless of whether the orders which he was to fill upon his solicitation were to be obtained by him within the State or without the State; that therefore there was no interference with interstate commerce, no tax upon commerce, but a mere license required of a person who voluntarily engaged in a business in the State within the police powers of the State.

And, finally, there has not been shown to exist in this case any direct interference with interstate commerce, and no such plain and palpable violation of section 8 of article 1 of the Constitution of the United States as would permit this court to set aside and annul a legislative act made in furtherance of the welfare and well being of the people of the Commonwealth involved.

Again thanking the court for the gracious permission to file this additional brief, we respectfully submit the foregoing.

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Supreme Court of the United States.

No. 149.—October Term, 1906.

Jay Delamater, Plaintiff in Error, vs. The State of South Dakota. } In error to the Supreme Court of the State of South Dakota.

[March 11, 1907.]

Mr. Justice White delivered the opinion of the Court.

A firm established in St. Paul, Minnesota, which was engaged in dealing in intoxicating liquors, employed Delamater, the plaintiff in error, as a traveling salesman. As such salesman Delamater, in the State of South Dakota, carried on the business of soliciting orders from residents of that State for the purchase, from the firm in St. Paul, of intoxicating liquors in quantities of less than five gallons. The course of dealing was this: The orders were procured in the form of proposals to buy, and when accepted by the firm the liquor was shipped from St. Paul to the persons in South Dakota who made the proposals, at their risk and cost, on sixty days' credit. At the time Delamater engaged in South Dakota in the business just stated the law of that State imposed an annual license charge upon "the business of selling or offering for sale" intoxicating liquors within the State, "by any traveling salesman who solicits orders by the jug or bottle in lots less than five gallons." A violation of the statute was made a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. Delamater, not having paid the license charge, was prosecuted under the statute. At the trial, although the uncontradicted proof established the carrying on of business within the State, as above mentioned, Delamater requested a binding instruction to the jury in his favor, on the ground that the statute did not apply, and if it did, that it was void because repugnant to the commerce clause of the Constitution of the United States. Exception was taken to the refusal to give the instruction. The Federal ground was reiterated in motions to arrest and for a new trial, and the Supreme Court of the State, to which the cause was taken, in affirming the judgment of conviction expressly considered and disposed of such Federal ground. (104 N. W. 537.)

All the assignments of error involve the proposition that the State statute, as construed and applied by the court below, is repugnant to the commerce clause of the Constitution. It is manifest, as the subject dealt with is intoxicating liquors, that the decision of the cause does not require us

to determine whether the restraints which the statute imposes would be a direct burden on interstate commerce if generally applied to subjects of such commerce, but only to decide whether such restraints are a direct burden on interstate commerce in intoxicating liquors as regulated by Congress in the act commonly known as the Wilson act. (26 Stat. L. 313, chap. 728.) For this reason we at once put out of view decisions of this court, which are referred to in argument and which are noted in the margin,* because they concerned only the power of a State to deal with articles of interstate commerce other than intoxicating liquors, or which, if concerning intoxicating liquors, related to controversies originating before the enactment of the Wilson law.

The general power of the States to control and regulate the business of dealing in or soliciting proposals within their borders for the purchase of intoxicating liquors is beyond question. With the existence of this general power we are not, therefore, concerned. We are hence called upon only to consider whether the general power of the State to control and regulate the liquor traffic and the business of dealing or soliciting proposals for the dealing in the same within the State was inoperative as to the particular dealings here in question, because they were interstate commerce, and therefore could not be subjected to the sway of the State statute without causing that statute to be repugnant to the commerce clause of the Constitution of the United States.

It is well at once to give the text of the Wilson act, which is as follows (26 Stat 713, c. 728):

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

It is settled by a line of decisions of this court, noted in the margin,† that the purpose of the Wilson act, as a regulation by Congress of

* Robbins *v.* Shelby Taxing District, 120 U. S. 489; Corson *v.* Maryland, 120 Ib. 502; Asher *v.* Texas, 128 Ib. 129; Stoutenburg *v.* Hennick, 129 Ib. 141; Leisy *v.* Hardin, 135 Ib. 100; Lyng *v.* Michigan, 135 Ib. 161; Crutcher *v.* Kentucky, 141 Ib. 47; Brennan *v.* Titusville, 153 Ib. 289; Caldwell *v.* North Carolina, 187 Ib. 622; Norfolk & W. R. Co. *v.* Sims, 191 Ib. 441; Rearick *v.* Pennsylvania, 203 Ib.

† In re Rahrer, 140 U. S. 545; Rhodes *v.* Iowa, 170 Ib. 412; Vance *v.* W. A. Vandercook Co., 170 Ib. 438; American Express Co. *v.* Iowa, 196 Ib. 133; Adams Express Co. *v.* Iowa, 196 Ib. 147; Pabst Brewing Co. *v.* Crenshaw, 198 Ib. 17; Foppiano *v.* Speed, 199 Ib. 501; Heyman *v.* Southern Ry. Co., 203 Ib. 270.

interstate commerce, was to allow the States, as to intoxicating liquors, when the subject of such commerce, to exert ampler power than could have been exercised before the enactment of the statute. In other words, that Congress sedulous to prevent its exclusive right to regulate commerce from interfering with the power of the States over intoxicating liquor, by the Wilson act adopted a special rule enabling the States to extend their authority as to such liquor shipped from other States before it became commingled with the mass of other property in the State by a sale in the original package.

The proposition relied upon, therefore, when considered in the light of the Wilson act, reduces itself to this: Albeit the State of South Dakota had power within its territory to prevent the sale of intoxicating liquors, even when shipped into that State from other States, yet South Dakota was wanting in authority to prevent or regulate the carrying on within its borders of the business of soliciting proposals for the purchase of liquors, because the proposals were to be consummated outside of the State, and the liquors to which they related were also outside the State. This, however, but comes to this, that the power existed to prevent sales of liquor, even when brought in from without the State, and yet there was no authority to prevent or regulate the carrying on the accessory business of soliciting orders within the State. Aside, however, from the anomalous situation to which the proposition thus conduces, we think to maintain it would be repugnant to the plain spirit of the Wilson act. That act, as we have seen, manifested the conviction of Congress that control by the States over the traffic of dealing in liquor within their borders was of such importance that it was wise to adopt a special regulation of interstate commerce on the subject. When, then, for the carrying out of this purpose the regulation expressly provided that intoxicating liquors coming into a State should be as completely under the control of a State as if the liquor had been manufactured therein, it would be, we think, a disregard of the purposes of Congress to hold that the owner of intoxicating liquors in one State can, by virtue of the commerce clause, go himself or send his agent into such other State, there in defiance of the law of the State, to carry on the business of soliciting proposals for the purchase of intoxicating liquors.

Passing from these general considerations let us briefly more particularly notice some of the arguments relied upon.

As we have stated, decisions of this court interpreting the Wilson act have held that that law did not authorize State power to attach to liquor shipped from one State into another before its arrival and delivery within the State to which destined. From this it is insisted, as none of the liquor covered by the proposals in this case had arrived and been delivered

within South Dakota, the power of the State did not attach to the carrying on of the business of soliciting proposals, for until the liquor arrived in the State there was nothing on which the State authority could operate. But this is simply to misapprehend and misapply the cases and to misconceive the nature of the act done in the carrying on the business of soliciting proposals. The rulings in the previous cases to the effect that, under the Wilson act, State authority did not extend over liquor shipped from one State into another until arrival and delivery to the consignee at the point of destination, were but a recognition of the fact that Congress did not intend, in adopting the Wilson act, even if it lawfully could have done so, to authorize one State to exert its authority in another State by preventing the delivery of liquor embraced by transactions made in such other State. The proposition here relied on is widely different, since it is that, despite the Wilson act, the State of South Dakota was without power to regulate or control the business carried on in South Dakota of soliciting proposals for the purchase of liquors, because the proposals related to liquor situated in another State. But the business of soliciting proposals in South Dakota was one which that State had a right to regulate, wholly irrespective of when or where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped. Of course if the owner of the liquor in another State had a right to ship the same into South Dakota as an article of interstate commerce and, as such, there sell the same in the original packages, irrespective of the laws of South Dakota, it would follow that the right to carry on the business of soliciting in South Dakota was an incident to the right to ship and sell, which could not be burdened without directly affecting interstate commerce. But, as by the Wilson act, the power of South Dakota attached to intoxicating liquors, when shipped into that State from another State after delivery but before the sale in the original package, so as to authorize South Dakota to regulate or forbid such sale, it follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors were situated in other States, cannot be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in South Dakota, a right which by virtue of the Wilson act did not exist.

2. Nor is there merit in the arguments based on the ruling in *Vance* v. *W. A. Vandercook Co.*, (170 U. S. 438.) The controversies in that case and the matters therein decided were recapitulated in *Pabst Brewing Co.* v. *Crenshaw*, (198 U. S. 17,) as follows (p. 25):

"In *Vance* v. *W. A. Vandercook Co.*, (170 U. S. 438,) the operation of a liquor law of South Carolina was considered. By the act in question the State of South Carolina took exclusive charge of the sale of liquor within

the State, appointed its agents to sell the same, and empowered them to purchase the liquor which was to be brought into the State for sale. The fact was that by the act in question the State of South Carolina, instead of forbidding the traffic in liquor, authorized it, and engaged in the liquor business for its own account, using it as a source of revenue. The act, in addition, affixed prerequisite conditions to the shipment into South Carolina from other States of liquor to a consumer who had purchased it for his own use, and not for sale. Considering the Wilson act and the previous decisions applying it, in so far as it took charge in behalf of the State of the sale of liquor within the State, and made such sale a source of revenue, was not an interference with interstate commerce. In so far, however, as the State law imposed burdens on the right to ship liquor from another State to a resident of South Carolina, intended for his own use, and not for sale within the State, the law was held to be repugnant to the Constitution, because the Wilson act, whilst it delegated to the State plenary power to regulate the sale of liquors in South Carolina shipped into the State from other States, did not recognize the right of a State to prevent an individual from ordering liquors from outside of the State of his residence for his own consumption, and not for sale."

It having been thus settled that under the Wilson act a resident of one State had the right to contract for liquors in another State and receive the liquors in the State of his residence for his own use, therefore, it is insisted, the agent or traveling salesman of a non-resident dealer in intoxicating liquors had the right to go into South Dakota and there carry on the business of soliciting from residents of that State orders for liquor to be consummated by acceptance of the proposals by the non-resident dealer. The premise is sound, but the error lies in the deduction, since it ignores the broad distinction between the want of power of a State to prevent a resident from ordering from another State liquor for his own use and the plenary authority of a State to forbid the carrying on within its borders of the business of soliciting orders for intoxicating liquors situated in another State, even although such orders may only contemplate a contract to result from final acceptance in the State where the liquor is situated. The distinction between the two is not only obvious, but has been foreclosed by a previous decision of this court. That a State may regulate and forbid the making within its borders of insurance contracts with its citizens by foreign insurance companies or their agents is certain. (*Hooper* v. *California*, 155 U. S. 648.) But that this power to prohibit does not extend to preventing a citizen of one State from making a contract of insurance in another State is also settled. (*Allgeyer* v. *Louisiana*, 165 U. S. 577.) In *Nutting* v. *Massachusetts*, (183 U. S. 553) the court was called upon to consider these two subjects—that is, the power of the State on the one hand to forbid the making within the State of contracts of insurance with unauthorized insurance companies and the right of the individual on his own behalf to make a contract with such insurance companies in another State as to property

situate within the State of residence. The case was brought to this court to review a conviction of Nutting, a citizen of Massachusetts, for having negotiated insurance with a company not authorized to do business in Massachusetts, contrary to the statutes of that State. Briefly, the facts were that Nutting, an insurance broker, solicited in Massachusetts a contract of insurance on property belonging to McKie situated in that State. The proposal was accepted outside of the State of Massachusetts and the policy also issued outside of that State. The contention of the plaintiff in error was that as the contract was consummated outside of Massachusetts, the conviction was repugnant to the Fourteenth Amendment, because the acts done did not fall within the general principle announced in *Hooper* v. *California, supra*, but were within the ruling in *Allgeyer* v. *Louisiana*. The conviction was affirmed not because the contract was consummated in Massachusetts, but upon the ground that the right of an individual to obtain insurance for himself outside of the State of his residence did not sanction the conduct of Nutting, as an insurance broker, in carrying on the business in Massachusetts of soliciting unauthorized insurance. After reviewing the Hooper and Allgeyer decisions and pointing out that there was no conflict between the two cases, the court said (p. 558):

"As was well said by the supreme judicial court of Massachusetts: 'While the legislature cannot impair the freedom of McKie to elect with whom he will contract, it can prevent the foreign insurers from sheltering themselves under his freedom in order to solicit contracts which otherwise he would not have thought of making. It may prohibit, not only agents of the insurers, but also brokers, from soliciting or intermeddling in such insurance, and for the same reasons." (175 Mass. 156, 55 N. E. 895.)"

The ruling thus made is particularly pertinent to the subject of intoxicating liquors and the power of the State in respect thereto. As we have seen, the right of the States to prohibit the sale of liquor within their respective jurisdictions in and by virtue of the regulation of commerce embodied in the Wilson act is absolutely applicable to liquor shipped from one State into another after delivery and before the sale in the original package. It follows that the authority of the States, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the States to forbid agents of non-resident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors which otherwise the citizen of the State "would not have thought of making," must be as complete and efficacious as is such authority in relation to contracts of insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor.

3. The contention that the law of South Dakoia was a taxing law and not a police regulation, and therefore not within the purview of the Wilson act, is in conflict with the purpose of that law as interpreted by the Supreme Court of South Dakota. (*State* v. *Beuchler*, 10 S. D. 156.) Besides, the contention is foreclosed by the ruling of this court in *Pabst Brewing Co.* v. *Crenshaw, supra.*

Affirmed.

The CHIEF JUSTICE dissents.

True copy.

Test:

Clerk Supreme Court, U. S.